Supreme Court, U.S.
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No. 92-1750

In The

Supreme Court of the United States

October Term, 1993

JOHN C. FOGERTY

Petitioner,

vs.

FANTASY, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

KENNETH I. SIDLE*
VINCENT H. CHIEFFO
JULIA L. ROSS
GIPSON HOFFMAN & PANCIONE
1901 Avenue of the Stars
Suite 1100
Los Angeles, CA 90067
(310) 556-4660

LAWRENCE S. ROBBINS*
OF MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006-1882
(202) 463-2000

MALCOLM BURNSTEIN
OF BURNSTEIN & TRIMBUR
685 Market Street, Suite 690
San Francisco, CA 94105
(415) 243-0191

*Counsel of Record

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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WHERE DID THE REST OF CREEDENCE GO?

By JON MATSUMOTO

As the band's principal songwriter and vocalist, John Fogerty was Creedence Clearwater Revival to most rock fans. But what about the other three members of the group, bassist Stu Cook, drummer Doug Clifford and rhythm guitarist Tom Fogerty?

How do they look back on the group? What are they doing now? What do they think about Fogerty's new record?

One thing the three apparently agree on is there are no plans for a Creedence reunion.

"I wouldn't count on it," said Cook by phone from his home in Berkeley.

"Obviously, John doesn't want to bring Creedence back together. Even if he did, I would have my misgivings about such a venture. We just have never been able to recapture the camaraderie that existed when we started out. Why should we get together unless it's just to make a lot of money?"

According to Cook, the demise of Creedence was set off by a sibling rivalry between brothers John and Tom. The latter had been the leader of the group in its pre-Creedence days, but John guided it through its string of hits. Tom eventually began to demand more artistic input, which John was unwilling to grant, Cook says.

Clifford also attributed some of Creedence's breakup to the tumultuous relationship that existed between John Fogerty and Fantasy Records. "But I'd rather not dwell

on the breakup," he said by phone from his home in Lake Tahoe. "I'd rather think positively about the longevity of Creedence's music."

Despite the strong feelings that Creedence won't get back together, Cook and Clifford believe that the group members are still capable of recapturing their old magic together on a musical level. Both base their opinions on an impromptu reunion they had with John in October of 1983.

"John, Doug and I all played at our high school reunion," Cook recalled. "Doug and I didn't think John would come because he's not a real socializer. But he and his wife showed up and we talked for a couple of hours and had dinner. Then afterward, John came up to us and asked if we wanted to play. We played a mixture of old Creedence tunes and some blues covers that we used to do before we were called Creedence. It all seemed so natural."

Though Cook believes John is responsible for some of the all-time great rock songs, he's less than thrilled with Fogerty's new single, "The Old Man Down the Road."

"From what I've heard on the radio, I am not impressed," he said. "Don't get me wrong. I wish him well. But if he was going to copy an old Creedence tune, he should have picked 'Proud Mary' instead of 'Run Through the Jungle.' If we weren't good enough to play in his band, and this is what he's come up with by playing all the instruments himself, I am glad I didn't play on this album."

Clifford concurred, "I'm kind of disappointed. I expected it to be a little more contemporary. It sounds really stiff. I guess you can't expect much growing if you haven't worked with anyone else in 10 years."

Since Creedence split, the other three have been involved in studio work. Tom Fogerty, who lives in Arizona, has released several albums and, according to Cook, is about to begin work on another. Clifford is also looking forward to recording a solo album this year, in addition to playing drums for a new Doug Sahm album.

Though Cook anchored the rhythm (with Clifford) for Sahm's 1974 album "Groovers Paradise" and produced two Roky Erickson and the Aliens LPs, he spends most of his time now leading a quiet, leisurely life. Besides playing golf and talking to people around the world on his ham radio, he is enrolled in hotel and restaurant management courses at Golden Gate University. Cook who is considering opening up a restaurant also spends time recording songs on a four-track recorder and playing rock with local musician friends.

Despite some unpleasant memories over Creedence's breakup, Cook still looks back fondly over his years with the band.

"I miss the feedback and the communication that goes on between audience and entertainer," he explained. "It's something that really gives you a buzz. Playing Woodstock and the Royal Albert Hall in London were definite highlights.

"I think Creedence will be remembered as one of the great bands. That really gives you a sense of accomplishment that (every band member) should have, no matter how things turned out in the end. We really shouldn't be dwelling on how it all came apart." ■

DECLARATION OF DR. PAUL O. W. TANNER

I Paul O. W. Tanner declare as follows:

1. I am a musician, musicologist and professor of music. I am 67 years of age and have been involved professionally with music of all kinds since the age of 13 when I first became professionally employed as an instrumentalist (trombone). From the age of 20 on, I worked as an instrumentalist with many of the top popular music orchestras and swing bands in the United States, including the Glenn Miller band for its entire 4½ year long civilian duration and then with such other leaders as Charley Spivak, Les Brown, Tex Beneke, Henry Mancini, Nelson Riddle and many others. I have also performed with classical orchestras under the direction of such conductors as Leonard Bernstein, Walter Hendl, Zubin Mehta, Eugene Ormandy, Andre Previn, Arturo Toscanini, and Bruno Walter. I worked extensively in studio orchestras for all of the major motion picture, television and recording studios in Los Angeles and played first trombone for the American Broadcasting Company Orchestra in Los Angeles for a period of sixteen years. In the area of rock and roll music, I have performed on records with such successful groups as the Beach Boys and many groups released on the Motown Record Company label.

Following service in World War II, I returned to school at UCLA and earned my bachelor's degree in music *magna cum laude*. I stayed at UCLA and earned, successively, my master's degree and a Ph.D. in music. I then remained at UCLA as a professor of music for a total of 23 years until my retirement a few years ago. While at

UCLA I taught in all four of the sub-disciplines into which the music department's program was divided: performance, theory, musicology, and music education. The course I taught there in the subject "The Development of Jazz" consistently attracted a large student following: in the aggregate more than 75,000 students passed through that course. Early in the 1970's, I was accorded the title "Distinguished Professor of Music" at UCLA. While at UCLA I also lectured and conducted music clinics at a wide and diverse list of other universities including the University of Southern California, California State University Northridge, California State University Long Beach, the University of Washington, North Texas State University, the University of Indiana, the University of Florida, the University of North Carolina, Georgia State University, the University of Arkansas, the University of Wisconsin, the University of Arizona, Arizona State University and Kent State University. I have also lectured in foreign locales, including London, Johannesburg and Venice.

In the area of writing and publication, I have composed many published works, emphasizing concertos and other works for my first-learned instrument, the trombone, and I have authored and published numerous books on learning methodology for the playing of that instrument.

Several years ago, I authored a textbook on the history of jazz, entitled "A Study of Jazz", which has become the most widely used textbook on the subject in the world and is currently in use at several hundred colleges and universities through the United States. In the same vein, I

wrote and composed an educational film, entitled "Discovering Jazz", for the Columbia Broadcasting System, which is widely circulated in educational circles.

Since my retirement from UCLA, I have lectured extensively in music and, in particular, on the history of jazz. I am currently committed to lecture on the subject at the American University in Paris and at the American University in London during March of 1985.

2. I have compared the melodies of the compositions respectively entitled "Run Through the Jungle" by John C. fogerty and "The Old Man Down The Road" by John Fogerty. My comparison was done by listening to the composition "Run Through the Jungle" as performed on the Creedence Clearwater Revival Record Album entitled "Cosmo's Factory" (Fantasy Record Album No. 8402) and to "The Old Man Down The Road" as performed by John Fogerty on the record album entitled "Centerfield" (Warner Bros. Record Album No. 1-25203). I transcribed the music from the albums into comparative melody lines written in customary musical notation, and in doing so I also had reference to the lead sheet of "Run Through the Jungle" as filed with the Copyright Office by Jondora Music dated 1970. A copy of the results of that comparative transcription is attached to this declaration, marked Exhibit A and by this reference incorporated herein as though set forth in full at this point.

3. Based upon my experience and the comparison described above, it is my opinion that "The Old Man Down the Road" is substantially similar to "Run Through The Jungle" both with respect to the entirety of the melody and as to all individual musical characteristics.

Indeed, in my opinion, the similarities between the two are so strong as to make them virtually identical musically. Without limiting the generality of that opinion, but only to illustrate the specifics of the similarity (indeed identity) between the two compositions, the following observations are in order:

(a) The tempos are virtually the same.

(b) The harmonic pattern in which the melody is performed is identical; both compositions use but a single harmony, the tonic minor cord.

(c) Both follow the identical structure of an eight-bar verse and a short chorus.

(d) Both follow virtually the identical melody line, the melody being composed of the lowered (or flatted) seventh note and the tonic note above it. I have indicated, by lines drawn from the staff of one of the indicated melodies to the staff of the other on Exhibit A, the places where the melodies are identical.

Where there are apparent differences between the melodies, the differences are of no musical substance. Thus:

(i) The last note of the first bar of "Run Through the Jungle" drops from the tonic to the flatted seventh while the comparable note in "The Old Man Down the Road" remains at the tonic. This is an insubstantial variation because the notes are "off the beat" (i.e., they receive no emphasis), within the same harmonic and in each instance merely lead into the emphasized first note of the second bar which in each case is the tonic;

(ii) The last two beats of the second bar of "Run Through the Jungle" are occupied by a rest, while the last two beats of the second bar of "The Old Man Down The Road" are occupied by a half beat rest and three eighth notes (one-half beat each) of the flatted seventh. Those eighth notes have no musical value and are termed "pick-up notes" among musicians because their only function is to lead into the following bar of music. They can be dispensed with without affecting the melody and are usually included in compositions only to provide tonalities at which non-emphasized syllables of the lyrics can be sung. Similar "pick-up notes" appear in the last one and one-half beats of the fourth bar of "The Old Man Down the Road" and again at the end of the eighth, tenth, and twelfth bars of both songs, where their tonalities are identical;

(iii) The last note of the third bar of "Run Through the Jungle" (the penultimate note of the first phrase of the melody) is raised to the minor third while the comparable note of "The Old Man Down The Road" remains at the tonic. Again this is an insubstantial variation, being within the same harmonic, being at an "off the beat" position in the melody line and serving merely as a lead-in to the emphasized first note of the fourth bar which is the identical tonic note in each song. Raising the note in this fashion is merely an embellishment or a variation on the melody and is of a kind which has been commonly heard in types of music influenced by the Blues form (jazz, swing, and rock and roll) since the beginnings of the Blues;

(iv) the last phrase of the chorus of "Run Through the Jungle" occupies two bars while the last phrase of the chorus of "The Old Man Down the Road" occupies four bars. However, the phrases are melodically identical, hence the four-bar phrase in "The Old Man Down the Road" is merely an elongation of the two-bar phrase in "Run Through the Jungle". Thus, the same notes are spread through a longer time period but are in all other respects identical and therefore constitute the same melody.

4. Because music is an auditory medium, comparison was also made between the audible presentations of the songs on the two records identified above. The auditory comparison confirms the substantial similarity, indeed the essential identity, between the two. They are exactly the same in feeling, timbre and register and in all essential respects are treated the same in arrangements. Thus, the ostinato figurations used as background in the recording of "Run Through the Jungle" are also used identically in "The Old Man Down the Road". The guitar figurations used as introductory musical material and as "fill-in" are identical as indicated by the last two lines of staff (under the heading "guitar figuration") on Exhibit A, the only differences being an insignificant variation in the time values of the notes in the second bar.

5. Based upon all of the foregoing, it is my conclusion that the melody to the "Old Man Down the Road" is the same as the melody to "Run Through the Jungle", i.e., substantially similar, and that such differences as may exist between the two melodies are insubstantial and

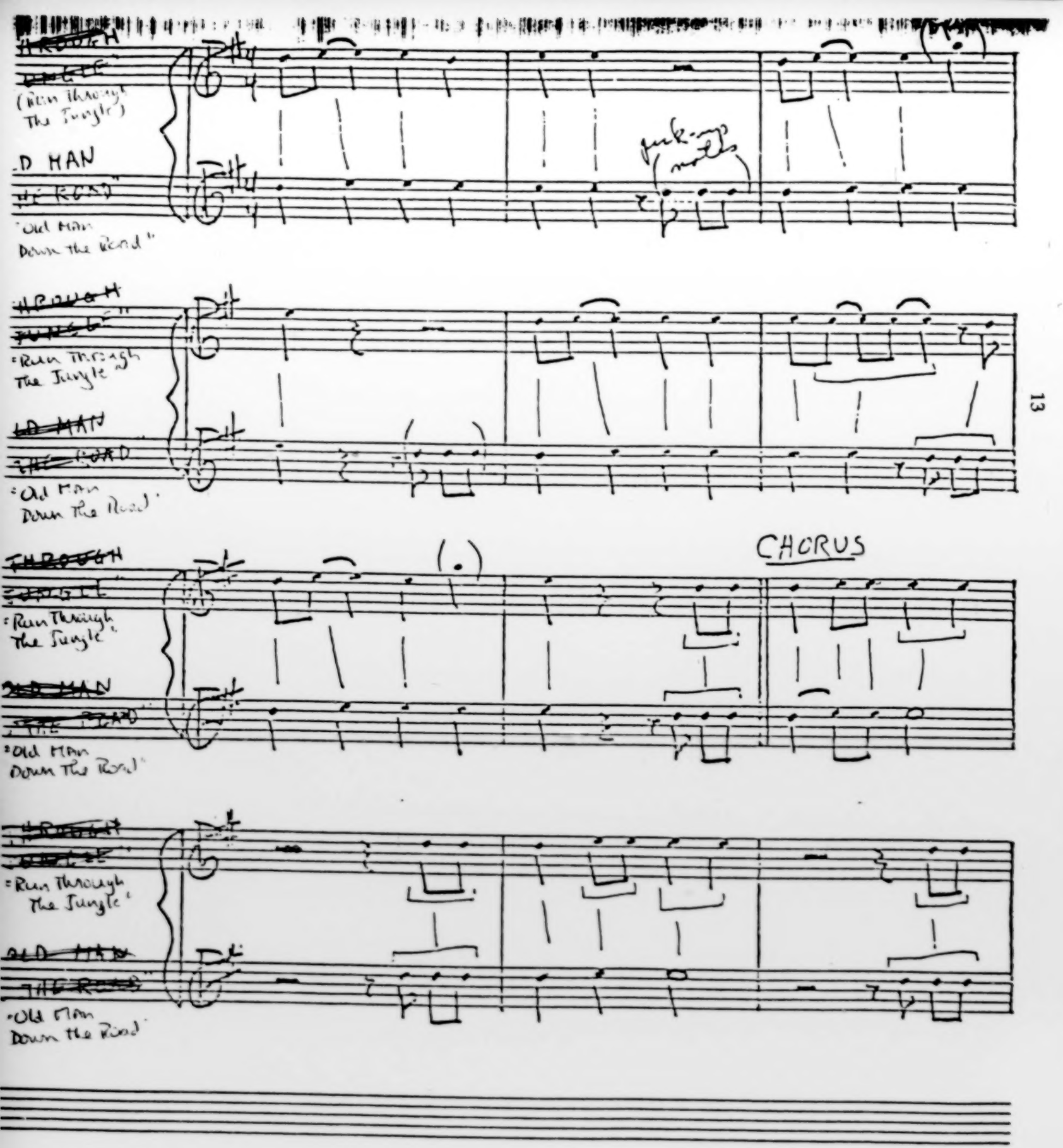
indeed insignificant. This opinion is confirmed by a comparative listening to the presentations of the two compositions on the respective records. The auditory impression made by the two compositions on the listener is in all respects the same musically, the only differences between the two being in the words of the lyrics to the respective compositions.

6. All of the foregoing is stated on my own personal knowledge, except as to the matters of opinion hereinabove expressed, and as to those matters of opinion, my opinion is based upon the facts hereinabove set forth and upon my experience, education, and training in music, and said opinion is truly held. If called as a witness in this proceeding I could testify competently to all of the foregoing.

I declare under penalty of the perjury laws of the State of California that the foregoing is true and correct.

Executed at Los Angeles, California this 5 day of February, 1985.

/s/ Paul O. W. Tanner
PAUL O. W. TANNER
Declarant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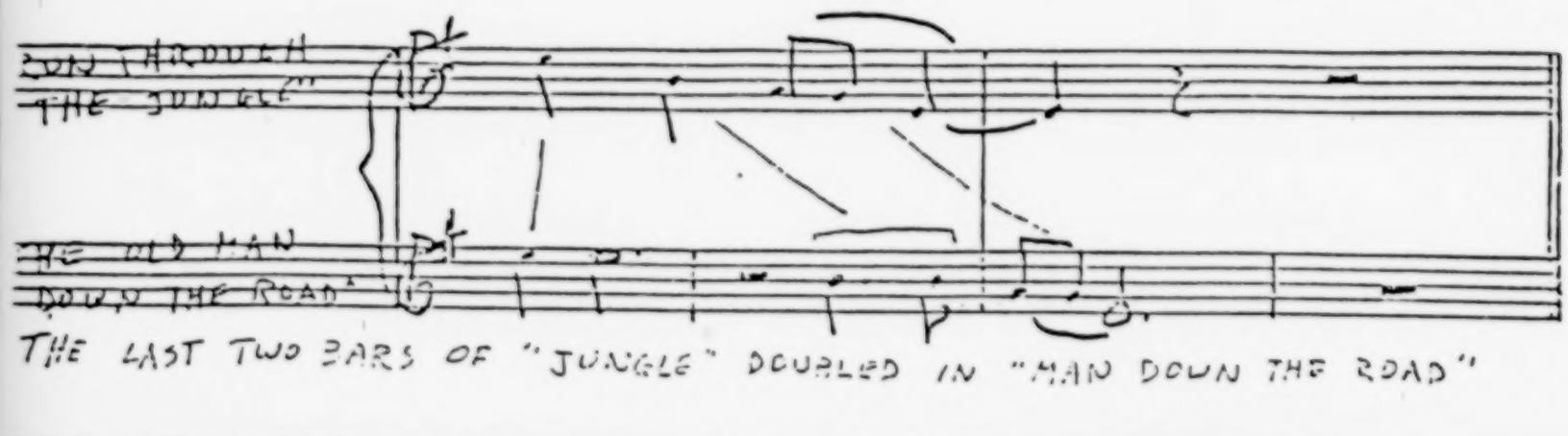
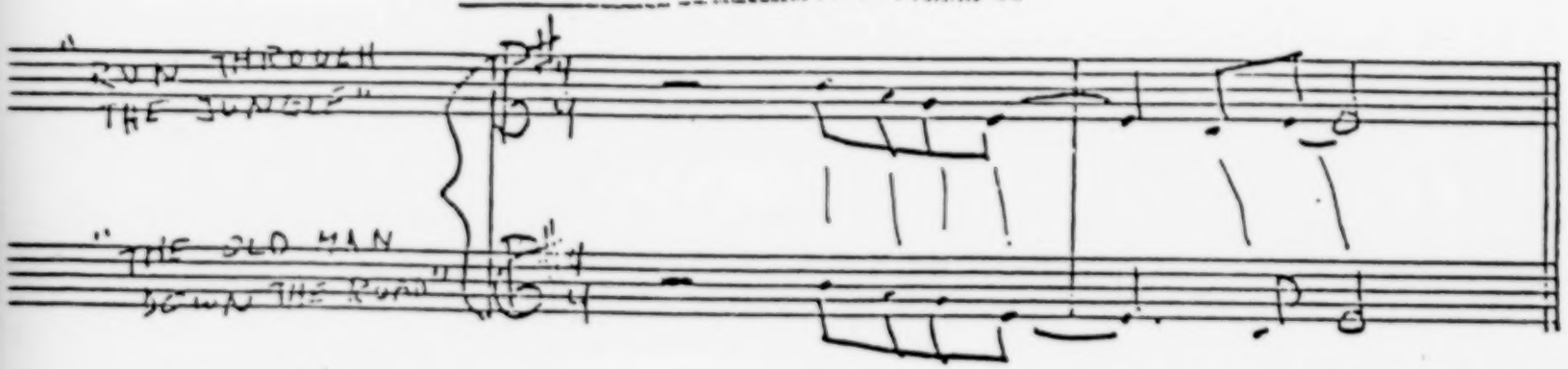


THE LAST TWO BARS OF "JUNGLE" DOUBLED IN "MAN DOWN THE ROAD"

GUITAR FIGURATION



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FANTASY, INC., Plaintiff, v. JOHN C. FOGERTY, WENAHA MUSIC CO., WARNER BROS. RECORDS, INC., WEA INTERNATIONAL, INC., WARNER COMMUNICATIONS, INC., WEA MANUFACTURING, INC., WEA CORPORATION, Defendants. AND COUNTERCLAIMS	No. C 85 4929 SC JUDGMENT (Filed Nov. 7, 1988)

In accordance with the verdict of the jury in this case, as entered on November 7, 1988, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Judgment shall be entered for Defendants John C. Fogerty, et al., and against Plaintiff Fantasy, Inc.

Dated: November 7, 1988

/s/ Samuel Conti
United States District Judge

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GIPSON, HOFFMAN & PANCIONE
A Professional Corporation
KENNETH I. SIDLE
VINCENT H. CHIEFFO
MARK S. ROSENBERG
1888 Century Park East, Suite 1777
Los Angeles, California 90067
(213) 556-4660

RUDIN AND APPEL
MILTON A. RUDIN
JOSEPH L. GOLDEN
9601 Wilshire Boulevard
Suite 800
Beverly Hills, California 90210

Attorneys for Defendants

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FANTASY, INC., Plaintiff, vs. JOHN C. FOGERTY, et al. Defendants.	CASE NO. C-85-4929-SC NOTICE OF MOTION FOR AN AWARD OF REASONABLE ATTORNEYS' FEES AND COSTS
AND RELATED CROSS-ACTIONS.	DATE: January 6, 1989 TIME: 10:00 a.m. COURTROOM: One

(Filed Nov. 22, 1988)

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on January 6, 1989, at 10:00 a.m., or as soon thereafter as counsel may be heard, in Courtroom No. One in the United States Courthouse,

450 Golden Gate Avenue, San Francisco, California, defendants John C. Fogerty, Warner Bros. Records, Inc., WEA International, Inc., WEA Manufacturing, Inc., WEA Corporation and Warner Communications, Inc. (collectively "Defendants") will move this court for an Order granting Defendants an award of full costs of suit, including reasonable attorney fees. This motion is made pursuant to the United States Copyright Act, 17 U.S.C. § 505 and Rule 270 of the Local Rules of the Northern District of California.

Said motion is made on the grounds that plaintiff's copyright infringement claim was frivolous, vexatious and initiated and prosecuted in bad faith. Said motion is based on this notice, Defendants' Memorandum of Points and Authorities, the Declarations of Kenneth I. Sidle and Vincent H. Chieffo, the pleadings and records on file herein, the trial held herein, and such other oral and documentary evidence which may be presented at the hearing.

DATED: November 22, 1988

GIPSON, HOFFMAN & PANCIONE
KENNETH I. SIDLE
VINCENT H. CHIEFFO
MARK S. ROSENBERG

RUDIN AND APPEL
MILTON A. RUDIN
JOSEPH L. GOLDEN

By /s/ VHC
Vincent H. Chieffo
Attorney for Defendants

[Certificate Of Service Omitted In Printing]

GIPSON HOFFMAN & PANCIONE
A Professional Corporation
Kenneth I. Sidle
Vincent H. Chieffo
1888 Century Park East
Suite 1777
Los Angeles, California 90067
(213) 556-4660

RUDIN AND APPEL
Milton A. Rudin
Joseph L. Golden
9601 Wilshire Boulevard
Suite 800
Beverly Hills, California 90210
(213) 274-4844

Attorneys for Defendants

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FANTASY, INC. Plaintiff, v. JOHN C. FOGERTY, et al., Defendants. AND RELATED COUNTERCLAIMS.	CASE NO. C 85 4929 SC MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR AN AWARD OF FULL COSTS INCLUDING REASONABLE ATTORNEYS' FEES DATE: January 6, 1989 TIME: 10:00 a.m. COURTROOM: ONE (Filed Nov. 22, 1988)

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I.
INTRODUCTION

This Memorandum is filed in support of the Motion of Defendants John C. Fogerty ("Fogerty"), Warner Bros. Records, Inc., WEA International, Inc., WEA Manufacturing, Inc., WEA Corporation, and Warner Communications, Inc. (collectively "Warner") for an award of their respective full costs, including reasonable attorneys' fees, pursuant to the United States Copyright Act, 17 U.S.C. §505, and this Court's Local Rule 270.

All defendants are entitled an award of their full costs, including reasonable attorneys' fees, because Fantasy, Inc.'s ("Fantasy") copyright infringement claim was frivolous, vexatious and initiated and prosecuted in bad faith as part of Saul Zaentz's ongoing, and admitted, "answer to a vendetta" that Zaentz claims Fogerty started years ago. Fantasy's claim that Fogerty "must have copied" is directly contrary to the legal position taken by Fantasy over many years when it secured independent copyrights on many Fogerty compositions without claiming that any of those similar compositions were ever copied from other Fogerty works. Granting this motion

would also deter Fantasy from filing future copyright infringement actions against Fogerty.[1]

II.

ARGUMENT

A. THIS COURT, IN ITS DISCRETION, SHOULD AWARD TO DEFENDANTS THEIR FULL COSTS, INCLUDING REASONABLE ATTORNEYS' FEES, INCURRED IN THE DEFENSE OF THIS ACTION IF THIS COURT BELIEVES THAT THIS ACTION WAS EITHER FRIVOLOUS OR WAS FILED AND PROSECUTED IN BAD FAITH BY FANTASY.

The Copyright Act grants this Court discretion to award to defendants, as prevailing parties, their full costs, including reasonable attorneys' fees, incurred in defending the copyright claim.

> "In any civil action under [the Copyright Act], the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the Court may also award a reasonable attorneys' fees to the prevailing party as part of the costs." 17 U.S.C. §505.

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[1] Filed concurrently herewith are declarations of Kenneth I. Sidle ("Sidle Decl. ¶___") and Vincent H. Chieffo ("Chieffo Decl. ¶___"), setting forth the costs and legal fees incurred by defendants in this action and establishing the reasonableness of those attorneys' fees. References to the Trial Transcript will be referred to as "T.T. ___." Copies of the referenced portions of the transcript are attached to the Chieffo Declaration. Concurrently with this Motion, a Memorandum of Costs is being filed pursuant to Local Rule 265. The costs included in that memoranda are also included in the schedules attached to the Sidle and Chieffo Declarations.

In the Ninth Circuit, the Court has discretion to award full costs, and reasonable attorneys' fees, pursuant to §505 if it finds that the action was frivolous or instituted and prosecuted in bad faith. *Olsen v. National Broadcasting Company, Inc.*, 855 F.2d 1446, 1454 (9th Cir. 1988); *Del Madera Property v. Rhodes & Gardner*, 820 F.2d 973, 980 (9th Cir. 1987); *Cooling Systems & Flexibles v. Stuart Radiator*, 777 F.2d 485, 493 (9th Cir. 1985); *Jartech, Inc. v. Clancy*, 666 F.2d 403, 407 (9th Cir. 1982). Such an award "represents a penalty for the institution of a frivolous or bad faith suit." *Jartech, Inc., supra*, 666 F.2d at 407. In addition to punishment an award of full costs and reasonable attorneys' fees to prevailing defendants also serves to deter the losing plaintiff, and others, from attempting to abuse the copyright laws, and the federal judicial system, by prosecuting bad faith or frivolous actions.

A copyright claim need not be dismissed before trial in order for it to be either frivolous or prosecuted in bad faith. In *Cooling Systems & Flexibles, supra*, 777 F.2d at 487, the Ninth Circuit had previously reversed a grant of summary judgment in favor of the defendant and remanded the matter for trial on the factual issues of infringement and damages. *Cooling Systems & Flexibles, Inc. v. Stuart Radiators, Inc.*, 711 F.2d 1062 (9th Cir. 1983) (mem.). On remand, the trial court granted a verdict for defendants after plaintiff rested its case at trial. 777 F.2d at 487. The trial court also awarded full costs and reasonable attorneys' fees to the prevailing defendant, although

it did not make any express finding that the action was either frivolous or brought in bad faith. The Ninth Circuit affirmed the award of attorneys' fees for the defendants, noting that the record demonstrated "sufficient indicia of bad faith and frivolity to justify the district court's holding." 777 F.2d at 493. As an example of such indicia, the Ninth Circuit pointed out the plaintiff's argument made "to bolster its substantial similarity claim" that the defendant could have avoided similarity to the plaintiff's allegedly infringed catalog by arranging the defendant's catalog "in a wide variety of very impractical ways" which "would have made the catalogs virtually useless." *Id.*

In addition to impractical arguments, at least one court has also found that the failure to make any reasonable settlement offers during the pendency of the litigation is also indicia of bad faith. *Goldman-Morgen Inc. v. Dan Brechner & Co., Inc.*, 411 F.Supp. 382, 391 (S.D.N.Y. 1976).

B. THERE IS SUBSTANTIAL EVIDENCE THAT THIS ACTION WAS BROUGHT AND PROSECUTED BY FANTASY AND SAUL ZAENTZ IN BAD FAITH, AND THAT THE CLAIM OF COPYING AGAINST FOGERTY WAS FRIVOLOUS.

As all parties have previously noted, this action is one of only six cases where an author's new work is

alleged to have infringed one of his own prior works.[2] To the best of plaintiff's knowledge, this is the only jury trial of any such copyright infringement claim. The only other music infringement claim involving the same author discovered by either plaintiff or defendants in this case is *Nom Music, Inc. v. Kaslin*, 227 F.Supp. 922 (S.D.N.Y. 1964), *aff'd* 343 F.2d 198 (2nd Cir. 1965). In *Nom Music*, however, the trial court found copying based upon the virtually identical words and music in both compositions which were both co-written by one of the defendants. 227 F.Supp. at 926-927. The real defense in the case was one of a technical nature by which defendant claimed plaintiff had lost copyright protection for the first song as a result of a failure to properly publish the work with a correct notice of copyright. 343 F.2d at 199. On appeal, the Second Circuit did not even discuss the questions of copying and of substantial similarity.

This is the only known case where the plaintiff claims to own the copyrights to many prior, separately copyrighted, works of the defendant composer and where the plaintiff had a long relationship with the defendant.[3]

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[2] *Franklin Mint Corp. v. National Wildlife Art Exchange*, 575 F.2d 62 (3rd Cir. 1978); *Nom Music. Inc. v. Kaslin*, 343 F.2d 198 (2nd Cir. 1965), *aff'd* 227 F.Supp. 922 (S.D.N.Y. 1964); *Esquire. Inc. v. Vargas Enterprises*, 81 F.Supp. 306 (N.D. Ill. 1948), *aff'd in relevant part, rev'd in part*, 185 F.2d 14 (7th Cir. 1950); *Warner Bros. Pictures v. Columbia Broadcasting System*, 102 F.Supp. 141 (S.D. Cal. 1951), *rev'd and aff'd in part*, 215 F.2d 145 (9th Cir. 1954); *Gross v. Seligman*, 212 F. 930 (2nd Cir. 1914).

[3] Fogerty has asserted a termination and rescission claim against Fantasy, seeking to recover ownership of his compositions. That claim has been asserted in this action and is the subject of concurrently filed motions. The argument in this por-

Fantasy has intimate knowledge of Fogerty's creativity, having served as Fogerty's music publisher and record company during the highly successful Creedence Clearwater Revival years. In short, neither Fantasy, nor its owner, Zaentz, are strangers to Fogerty and Fogerty's ability to create, independently, similar songs in the "swamp blues" and other genres favored by Fogerty.

In evaluating whether claims made by Fantasy in this case are either in bad faith or frivolous, it must always be kept in mind that Fantasy, and Zaentz, have this previous relationship and intimate knowledge of Fogerty's extraordinary abilities as a songwriter. Before this case, Fantasy and Zaentz never claimed that any Fogerty composition was copied, or derived, from any Fogerty prior work.

In light of this history, the grounds for making an award of full costs and reasonable attorneys' fees are compelling in this case. The Ninth Circuit standard for awarding such fees is well met by (1) Fantasy and Saul Zaentz's bad faith motive in prosecuting this lawsuit to punish Fogerty; (2) Fantasy's assertions of frivolous arguments and legal positions in its failed efforts to bolster its claims of substantial similarity and copying; (3) Fantasy's assertion of a claim of copying by Fogerty which claim is directly contrary to prior legal positions taken by Fantasy with respect to similarities among Fogerty's musical compositions; and (4) Fantasy's absurd and frivolous settlement proposal made during the litigation. In addition, an

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tion of the brief is without waiver of Fogerty's legal position that since he was elected to rescind and terminate the publishing agreements with Fantasy, Fantasy no longer owns the copyrights to Fogerty's prior works.

award of fees and costs to Fogerty and the Warner defendants is necessary to deter Fantasy from abusing its claimed ownership of the United States copyrights to numerous Fogerty musical compositions by filing any subsequent copyright infringement claims regarding new Fogerty compositions.

1. Zaentz's Bad Faith Motive To Prosecute This Action.

Saul Zaentz admitted that he holds great personal animosity against John Fogerty.

> "SIDLE: In fact, you have quite a personal vendetta going against John?
>
> ZAENTZ: It's an answer to a vendetta. It is a lot different than having a personal vendetta.
>
> SIDLE: In other words, you think John started this; is that what you are saying?
>
> ZAENTZ: Yes." T.T. 8-908:11-17.

The basis for Zaentz's personal animosity against Fogerty is Fogerty's belief, (a) that Saul Zaentz refused to fulfill an early promise made to Fogerty that if Creedence Clearwater Revival was successful, then Zaentz would "tear up the contract" and the group would be paid a fair share of the pie created by the group's success and (b) that Fogerty's loss of approximately $4,000,000 in an offshore tax scheme was caused by Saul Zaentz's recommendation to Fogerty that he enter into such scheme because its net economic effect would be the same as if Zaentz granted the royalty increase he had promised. Fogerty

sued Zaentz to recover his lost life savings. T.T. 8-908:23-8:909:5.

The lawsuit against Zaentz was dismissed on statute of limitation grounds. The case proceeded to trial against another defendant and resulted in a jury award of $8.6 million for Fogerty and the band. (T.T. 7-767:15 – 7-768:20.) Subsequently, Zaentz filed a malicious prosecution against not only Fogerty, but also Mr. Sidle. That action has been dismissed upon the grant of defendants' motion for summary judgment. In addition, Zaentz has sued Fogerty in Los Angeles, claiming Fogerty defamed Zaentz in two different compositions on the "CENTERFIELD" album and in numerous interviews. That action is still pending. (T.T. 8-910:2-24.)

Saul Zaentz has an intense, personal dislike of Mr. Fogerty and the wherewithal to prosecute numerous claims against Fogerty. At the merest pretext, Zaentz has, and will in the future, seek to vex and harass Fogerty by abusing the court system and bringing more frivolous actions against Fogerty unless deterred from doing so.

2. Fantasy's Assertions of Frivolous Arguments To Bolster Claims Of Substantial Similarity And Copying.

The bad faith and frivolous nature of this litigation is also exemplified by the numerous, weak and absurd arguments presented by Fantasy to bolster its claims of substantial similarity and of copying. These arguments go far beyond what the Ninth Circuit found to be indicia of bad faith and frivolous claims supporting an award of

attorneys' fees in *Cooling Systems & Flexibles, supra,* 777 F.2d at 493.

Fantasy persisted in its absurd arguments that the song writer's warranty granted by Fogerty in his original contract with Fantasy prevented Fogerty from presenting evidence of prior art to, demonstrate that any similarities between "OLD MAN" and "JUNGLE" arose from Fogerty's continued use of his own "swamp blues" style and of common compositional elements. This argument was presented to the Court before trial in an In Limine Motion seeking to prohibit the introduction of any prior art evidence by Fogerty. Although the motion was denied, plaintiff continued to press this absurd argument. All of plaintiff's tortured interpretation of the warranty granted by Fogerty was, at best, a dubious breach of contract claim not at issue at this copyright infringement trial.

Plaintiff also argued that Fogerty did not have the ability to independently create "OLD MAN" and that Fogerty must have copied "JUNGLE." Fantasy's expert, Earl Spielman, testified on numerous occasions that it was his opinion that Fogerty "must have copied." (T.T. 2-134:3-18; 2-143:10-13; 2-145:23 – 2-146:25; 9-970:7-9.) Plaintiff's other expert, Tanner, also seemed to express the opinion at trial that Fogerty must have copied, although at deposition, he admitted that he had "no way of knowing that." (T.T. 2-78:2-12; 2-58:4-9.)

Fantasy and its experts also argued throughout the trial that there "must have been copying" because "OLD MAN" is more like "JUNGLE" than any other Fogerty composition. (T.T. 2-132:16-19; 3-210:3-8.) Even assuming this to be a correct statement of fact, it is meaningless

because whenever one makes a comparison of one song to a group of songs, two of them will be the most alike.

Equally absurd was the argument presented by Fantasy by Mr. Rudman's cross-examination of Mr. Barlow, by Dr. Spielman in Fantasy's rebuttal presentation, and by Mr. Rudman in his closing argument, and which was based upon evidence of several compositions that were admitted copies of each other, but which had significant differences. The Court will recall the lengthy playing of "76 Trombones" and "Goodnight My Someone" from the Broadway show, "Music Man," the versions of "Proud Mary," performed by Tina Turner and by Fogerty, and the versions of "Wang Dang Doodle" by Howlin' Wolf and Koko Taylor. (T.T. 4-378:20 – 4-380:1; 8-927:5 – 8-929:13; 8-936:24 – 8-938.) Plaintiff then argued that because the admitted copies were allegedly more different from each other than "OLD MAN" was from "JUNGLE," then Fogerty must have copied "JUNGLE" when writing "OLD MAN." (T.T. 9-961:2 – 9-962:14; 9-978:20; 10-1058:20 – 10-1059:5.)

3. Fantasy's Bad Faith Reversal Of Its Prior Position That Fogerty's Earlier Works Were Independently Created.

Perhaps the strongest indicia of Fantasy's bad faith in prosecuting this frivolous lawsuit is the fact that Fantasy's basic claim that Fogerty "must have copied" is contradicted by Fantasy's legal positions taken during the years that Fogerty was under exclusive songwriting contract to Fantasy. The central issue in this case was whether any similarities found between "OLD MAN"

and "JUNGLE" were the result of copying by Fogerty or were the result of Fogerty's independent creation of "OLD MAN" using the same common compositional devices and the same Fogerty style as he used previously in composing "JUNGLE" and other songs in his "swamp blues" genre. Throughout the trial, Fantasy and its expert witnesses argued that the similarities were substantial and must have resulted from copying. Fantasy and its experts claimed that it was impossible for such similarities to result from independent creation by Fogerty. See *supra*, at p. 9.

Fantasy further argued during trial, and emphasized in closing argument, that "OLD MAN" must be a "derivative work" of "JUNGLE." (T.T. 10-1058:20 – 10-1059:5; 10-1142:6-11; 10-1143:9 – 10-1144:14.) A derivative work is "a work which incorporates and substantially copies the protectable features of the copyrighted work, together with new or different features, into an adaption of the original work." (Jury Instruction No. 19.) The Ninth Circuit has deemed "frivolous" any argument that a "derivative work" is anything other than an "infringing copy." *Lichtfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984).

Prior to bringing this action, however, Fantasy had always taken the opposite legal position. Despite similarities between Fogerty songs in the "swamp blues" genre, those songs were each separately copyrighted by Fantasy as independently created works and not as derivative works which were copied from earlier Fogerty compositions. Mr. Barlow testified on cross-examination that if a work is in fact a derivative work, but the copyright is registered as an independently created work, then a fraud upon the public has been committed. (T.T. 4-339:11-15.)

Under the copyright law then and now in effect, the copyright registration must specify that a work is a derivative work and the copyright will not extend the term of copyright protection for the material copied from the earlier work. 17 U.S.C. §§ 101, 102(b), 409(9); former § 7, 1909 Copyright Act. Under the current Act, a false copyright filing is a criminal offense. 17 U.S.C. § 506(e).

Before this action, Fantasy never claimed that any Fogerty song was copied from other Fogerty song and never registered any of the Fogerty compositions as derivative copyrights. Fantasy was correct in this. As Barlow testified, Fogerty's "swamp blues" songs were independently created and were not derivative works, although they did use the same musical ingredients. (T.T. 4-339:5 – 4-340:16.)

Fantasy's claim in this case is a complete reversal of its prior position. To support its new claims about Fogerty's creative powers, Fantasy went so far as to have its expert, Earl Spielman testify that not only was "OLD MAN" a copy of "JUNGLE," but that Fogerty had copied himself before. Spielman observed that Fogerty's compositions "KEEP ON CHOOGLIN' " and "BOOTLEG" had six out of eight identical measures in their choruses and that such similarity "is an example, if not necessarily of deliberate copying, but it certainly is an example of how the same melodic line used in the same way in two different songs has already occurred in Mr. Fogerty's early works." (T.T. 8-934:20-23.) Spielman's testimony directly contradicts the legal position taken by Fantasy during the 19 years since these two works were registered for copyright as independently created.

There was never a question that Fogerty's "swamp blues" compositions have many similarities. Dr. Spielman testified regarding the similarities among "GREEN RIVER," "KEEP ON CHOOGLIN'," "OLD MAN" and "JUNGLE." (T.T. 8-941:6-18, 8-943:18-8:944:5.) Harold Barlow testified regarding the similarities among "GREEN RIVER," "BOOTLEG," "OLD MAN" and "JUNGLE." (T.T. 3-260 – 3-286.) Dr. Eskelin testified regarding his findings based upon his stylistic analysis of Fogerty's work which identified numerous musical similarities among Fogerty's compositions, both within and without the swamp music genre. (T.T. 5-476 – 5-493.)

Fantasy has intimate knowledge of, and previously completely accepted, the independent creation by John Fogerty of many musical compositions with similar, and with respect to "KEEP ON CHOOGLIN' " and "BOOTLEG" identical, melodic lines. It was not until Fogerty was no longer subject to the exclusive songwriting contract with Fantasy and not until Saul Zaentz decided to punish Fogerty by launching Zaentz's campaign of litigation, that Fantasy ever suggested that Fogerty did not independently create each of his musical compositions.

Fantasy can have no good faith justification or explanation for this reversal in its position **vis-a-vis** Fogerty's creative abilities. It is obviously part of Zaentz's bad faith vendetta against Fogerty.

4. Bad Faith Settlement Proposal.

Further evidence that this litigation was brought in bad faith to punish Fogerty is found in Fantasy's failure

to ever make an effort to settle on any realistic basis. In September of 1986, Fantasy made the absurd proposal that it would settle this action if Fogerty would pay $1,800,000 to Fantasy. (Chieffo Declaration, ¶ 9, Exh. C.) This proposal was made before Fantasy substantially increased its claimed recovery by asserting the right to recover the foreign profits of Warner companies that were not parties to this litigation.

5. There Is A Need To Deter Fantasy From Abusing The Copyrights Through Future Claims.

All of the foregoing evidence of bad faith and the frivolous nature of this action is sufficient to justify an award of attorneys' fees as a punishment. Equally important to punishing Fantasy for bringing this action is the need to deter Fantasy and Saul Zaentz from bringing another one.

As long as Zaentz and Fantasy continue to control the copyrights of Fogerty's songs, they have a loaded gun which can be pointed at Fogerty at any time. As Fogerty continues his songwriting and performing career, he will invariably write new, independently created works in his "swamp blues" genre or his other styles. These new songs will have musical similarities to his earlier works. At any time, Zaentz and Fantasy may assert another ridiculous copyright infringement claim. Fogerty cannot deny access, and, if there is merely enough similarity to cause the issue to go to a jury trial (a minimum standard at best), then Fogerty would once again be put through the expense and harassment he has suffered in this case.

Fogerty must be protected against the clear risk that Zaentz and Fantasy will again abuse the copyright laws. The award to Fogerty of his costs and legal fees incurred in defending this frivolous claim will make it clear to Fantasy and Zaentz that the cost of harassing Fogerty will far exceed any personal satisfaction derived by Mr. Zaentz from such outrageous behavior.

This Court has heard and seen Saul Zaentz. The concern that he will bring another copyright infringement case is not an idle one. Fogerty deserves to be protected.

The award of full costs, including reasonable attorneys' fees, to defendants is well within this Court's discretion.

C. THE ATTORNEYS' FEES SOUGHT BY DEFENDANTS ARE REASONABLE.

This Court recently interpreted the meaning of "reasonable attorney's fees" in the context of a motion for an award of legal costs and attorneys' fees brought pursuant to federal statute.

In *Seven Gables Corp. v. Sterling Rec. Organization*, 686 F.Supp. 1418 (1988), an antitrust action, this Court granted plaintiff an award of attorneys' fees in the amount of $2,931,061.38. Plaintiff's motion was brought pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15(a), which provides that the court may award an injured party in an antitrust action "the cost of suit, including a reasonable attorney's fee." This is the same standard that applies to an award of costs and attorney's

fees under § 505 of the Copyright Act, except that § 505 allows an award of full costs.

In determining the amount of a reasonable attorney's fee the Court in *Seven Gables* was guided by the Ninth Circuit's decision in *Kerr v. Screen Extras Guild, Inc.* 526 F.2d 67 (9th Cir 1975) *cert. denied,* 425 U.S. 951, 966 S.Ct. 1726, (1976) (LMRDA claim, 29 U.S.C. § 901 *et. seq.*), where a twelve-factor test was adopted to determine the reasonableness of an attorney's fee award. *See also Laborers Clean-Up Contract v. Uriarte Clean-Up Ser.* 736 F.2d 516, 525 (9th Cir 1984) [ERISA claim, 29 U.S.C. § 1332(e)]. These factors or guidelines are,

> "(1) The time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases."

Under the *Kerr* factors applicable to this request for reasonable attorneys' fees, the amount requested on behalf of Fogerty, and on behalf of the Warner defendants, are appropriate.

1. The Time And Labor Required.

Extensive time and labor has been required in defending this action on behalf of both Fogerty and on behalf of all of the Warner defendants since its initiation in July of 1985. This action was not bifurcated until immediately before trial in October, 1988. While the trial only on the issue of infringement by Fogerty took two weeks, the defendants were required to take discovery and to be prepared to go to trial on all of the other issues, including extensive issues as to liability for some of the Warner defendants and extensive questions as to the calculation and recoverability of profits of Fogerty and of the Warner defendants. A trial on all of the disputed issues in this case would, most likely, have consumed at least two to three more weeks of court time.

Extensive discovery was conducted by plaintiff in this case. Fantasy took many days of deposition. Fantasy took the deposition of 12 individuals, including 8 individuals employed by various Warner companies and served multiple sets of interrogatories, requests for admissions and requests to produce to all parties.

Fantasy filed numerous motions, including a motion to dismiss and strike Fogerty's counterclaims, and the motion for summary judgment on the ultimate issue of copyright infringement, and on subsidiary infringement-related issues. Fogerty and Warner filed two summary judgment motions as well, going to Fogerty's status as a beneficial owner of the "JUNGLE" copyright and the disputed issues as to Fantasy's ownership of the copyright to "JUNGLE."

The matter was also initially scheduled for a full trial in September, 1986, which necessitated expedited preparation by defendants of the matter for trial when the stipulated motion for continuance was denied and until the parties were notified at the Pre-Trial Conference that the matter would be continued.

2. The Novelty And Difficulty Of The Questions Involved.

As this Court is aware, the copyright laws, and issues of infringement, are not within the normal purview of general legal practitioners and require a substantial amount of specialization. While the issue of infringement of one song by another is not necessarily novel, nor difficult, this case was novel in that it presented these issues in the context of the defendant who composed both works, and a plaintiff which was the defendant composer's former publishing and record company. Moreover, and while not required to be brought to trial, this case did present novel and difficult legal and factual questions involving Fantasy's claim to be entitled to recover the profits not only of the named defendants, but also of subsidiaries of some of the Warner defendants who were beyond the jurisdictional reach of this Court and whose profits were made, and retained, in countries outside of the United States. Counsel for Warner was required to prepare and analyze these difficult issues. Fantasy brought a summary judgment motion seeking an order determining such foreign, extraterritorial profits to be recoverable if infringement were found, and this Court denied that motion, based upon defendants' opposition.

3. The Skill Requisite To Perform The Legal Services Properly.

Copyright law is a narrow area of specialization. Defendants' lead counsel have extensive experience in practicing copyright law and in litigating to jury verdict copyright and copyright-related issues.

4. The Preclusion Of Other Employment.

It is obvious, given the extensive time necessarily spent in the defense of Fantasy's claims, that counsel for both Fogerty and for the Warner defendants were precluded from accepting other possible employment matters during the litigation of this action.

5. The Customary Fees.

The customary fees charged and received by the attorneys who have worked in this matter are set forth in the Declarations of Sidle and Chieffo. Those fees are customary and normal in the Los Angeles community for attorneys of comparable knowledge, skill and experience.

6. Whether The Fee Is Fixed Or Contingent.

This factor is not particularly relevant in the instant case. The fees to Fogerty and Warner were fixed and not contingent.

7. Time Limitations Imposed By The Client Or The Circumstances.

There are no time limitations imposed by either Fogerty or the Warner defendants. However, as pointed out

above, the circumstances did impose certain time limitations. This was most particularly true in the Fall of 1986, when the case was required to be readied for trial until a continuance was ordered shortly before the scheduled trial date, and after a stipulated motion for continuance had been denied.

8. The Amount Involved And The Results Obtained.

The results obtained was an obvious, and complete, victory for the defense. After a two week jury trial, the jury deliberated for approximately 2-1/2 hours and quickly returned a defense verdict. The amounts involved in this case were not litigated as a result of the bifurcation. Plaintiff, however, claimed that it was entitled to recover the profits earned by Fogerty and all of the Warner defendants, as well as the foreign profits earned and retained in foreign countries by subsidiaries of some of the Warner defendants. These profits claimed by plaintiff were not limited merely to the sale of "OLD MAN" in single form, but also included a claim for a substantial portion, in excess of 50%, of the profits earned from the entire "CENTERFIELD" album. Those profits, on a cumulative basis for all defendants, as calculated by plaintiffs, would have exceed $5,000,000. Fantasy made only one settlement demand in this action, and that was for the payment of $1,800,000 for a dismissal of the copyright infringement claims.

The potential amounts involved, needless to say, were quite substantial.

9. The Experience, Reputation And Ability Of The Attorneys.

As set forth in the Declarations of Sidle and Chieffo, the experience, reputation and abilities of the attorneys who worked on the defense of this action are considerable. That experience and reputation is not only in litigated matters, but also in copyright and copyright-related matters.

10. The Undesirability Of The Case.

This factor has no application in the present motion.

11. The Nature And Length Of The Professional Relationship With The Client.

Sidle has represented Fogerty since 1978. Sidle was the lead counsel in the prosecution of Fogerty's claim to recover his life savings lost in the Bahamian Castle Bank, offshore tax scheme recommended by Saul Zaentz, which was successfully tried and recovered an $8.6 million jury verdict for Fogerty and the three other members of the Creedence Clearwater Revival band. Chieffo has represented Warner Bros. Records and other companies in the Warner Communications Inc. family since 1974. The firm of Rudin and Appel have long-standing and close ties to Warner Communications. Mickey Rudin, as attorney for Frank Sinatra, was instrumental in the creation of Reprise Record Company which, after being acquired by Warner Bros. Inc., has become Warner Bros. Records, Inc.

12. Awards In Similar Cases.

Awards in other copyright cases have varied. A collection of cases awarding fees to plaintiffs and to defendants are set forth in Nimmer's copyright treatise, 3 Nimmer, *Nimmer On Copyright*, § 14.10[C] nn.19 and 20. What the reasonable attorneys' fees are in one case may not be indicative of what is reasonable in another because the issues and the other factors set forth above will vary. It is instructive to note, however, that in *Universal City Studios, Inc. v. Nintendo Co., Ltd.*, 615 F.Supp. 838 (S.D.N.Y. 1985), *aff'd* 797 F.2d 70 (2nd Cir.), *cert. denied*, 107 S.Ct. 578 (1986), the court awarded $83,525 in attorneys' fees to defendants and, also, an additional $1,142,545 as punitive damages on the tort counterclaim which sum the court noted was equal to the attorneys' fees incurred by the defendant in defending plaintiff's bad faith copyright claim.

Other cases have also awarded substantial attorneys' fees. *Original Appalachian Artworks, Inc. v. McCall Pattern Co.*, 825 F.2d 355 (11th Cir. 1987) ($100,000); *Transgo Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001 (9th Cir. 1985) ($250,000); *Calloway v. Marvel Entertainment Group*, 111 F.R.D. 637 647-51 (S.D.N.Y. 1986) (reasonable attorneys' fees of $233,000 awarded where actual attorneys' fees totalled $900,000); *Williams Electronics, Inc. v. Bally Mfg. Corp.*, 1983 Copyright Law Decisions (CCH), ¶ 25,582 (N.D. Ill. 1983) (awarded $93,000).

An analysis of the foregoing *Kerr* factors indicates that the actual legal fees incurred by Fogerty and by the Warner defendants in defending themselves against Fantasy's bad faith and frivolous claims is an appropriate,

and reasonable, attorneys' fee which should be paid to defendants by Fantasy.

As set forth in the Declarations of Chieffo and Sidle, total legal fees have been incurred by the Warner defendants of $197,462 and total legal fees have been incurred by Fogerty of $735,335. These are the actual fees these defendants have incurred in defending themselves in this action brought by Fantasy. All of those fees were necessarily incurred in the defense of this action. What portion of that total amount for each defendant should be awarded as reasonable attorneys' fees under the Copyright Act is left, by the statute and case law, to this Court's discretion.

Fogerty's and Warner's costs are also reasonable and were necessarily incurred to defend this action.[4] These costs are set forth in the declarations of Sidle and Chieffo.

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[4] In *Seven Gables*, the court limited the recovery of costs to those allowable under 28 U.S.C. § 1920 and Fed. Rule Civ. Proc. 54(d) pursuant to *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190,224 (9th Cir. 1964), cert. denied, 379 U.S. 880, 85 S.Ct. 143, 13 L.E.2d 87 (1964). In *Twentieth Century*, the court stated that the term "the cost of suit" used in 15 U.S.C. § 15 did not extend beyond those costs normally allowable pursuant to 28 U.S.C. § 1920 and Fed Rule Civ Proc 54(d). The copyright statute, 17 U.S.C. § 505 allows for the recovery of "full costs". There is no rationale for a limitation of costs as there is in the Clayton Act cases. Further, courts have even allowed double the cost incurred to be awarded against a plaintiff who brought an action under the Copyright Act. See *e.g. Simon & Flynn, Inc. v. Time Incorporated*, 513 F.2d 832 (2nd Cir 1975). *See also*, 3 M. Nimmer, Nimmer On Copyright § 14.09.

III.

SUMMARY

For the foregoing reasons, defendants request that this Court enter its order awarding to them their full costs, including an amount equal to their reasonable attorneys' fees, incurred in the successful defense of Fantasy's bad faith and frivolous copyright claim.

Dated: November 22, 1988

GIPSON HOFFMAN & PANCIONE
A Professional Corporation
Kenneth I. Sidle
Vincent H. Chieffo

RUDIN AND APPEL
Milton A. Rudin
Joseph L. Golden

By: /s/ Vincent H. Chieffo
VINCENT H. CHIEFFO
Attorneys for Defendants

[Certificate Of Service Omitted In Printing]

GIPSON, HOFFMAN & PANCIONE
A Professional Corporation
KENNETH I. SIDLE
VINCENT H. CHIEFFO
MARK S. ROSENBERG
1888 Century Park East, Suite 1777
Los Angeles, California 90067
(213) 556-4660

Attorneys for Defendant
John Fogerty

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FANTASY, INC., Plaintiff, vs. JOHN C. FOGERTY, WENAHA MUSIC CO., WARNER BROS. RECORDS, INC., WEA INTERNATIONAL, INC., Defendants. AND RELATED CROSS-ACTIONS.	CASE NO. C-85-4929-SC NOTICE OF ERRATA TO DEFENDANTS' MOTION FOR FULL COSTS INCLUDING ATTORNEYS' FEES Date: January 6, 1989 Time: 10:00 a.m. Courtroom: One (Filed Dec. 12, 1988)

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that defendants John C. Fogerty, et al., ("Defendants") are correcting the errors set forth below in Fogerty's Memorandum of Points and

Authorities in Support of its Motion for Full Costs Including Reasonable Attorneys' Fees, filed with the Court and served on plaintiff on November 22, 1988, as follows:

1. Table of Authorities, page iii, line 5, change "711 F. 2d 1062" to "777 F. 2d 485".

2. Table of Authorities, page iii, line 8, change "Esquire, Inc. v. Vargas Enterprises" to *"Esquire, Inc. v. Varga Enterprises"*.

3. Table of Authorities, page iii, line 22, change *"Lichtfield v. Spielberg"* to *"Litchfield v. Spielberg"*.

4. Table of Authorities, page iii, line 25, change *"Olsen v. National Broadcasting Company, Inc."* to *"Olson v. National Broadcasting Company, Inc."*

5. Table of Authorities, page iv, line 6, change "(1988)" to "(W.D. Wash. 1988)."

6. Table of Authorities, page iv, line 9, change *."Transgo Inc. v. Ajac Transmission Parts Corp."* to *"Transgo-Inc. v. Ajac Transmission Parts Corp."*

7. Table of Authorities, page iv, line 17, change "215 F. 2d 145 (1954)" to "216 F. 2d 945 (1954)," and add "cert. den., 348 U.S. 971, 75 S.Ct. 532 (1955)".

8. Table of Authorities, page iv, line 24, change "17 USC Section 505, pages 1, 3, 15, 22" to "17 USC Section 505, pages 1, 2, 3, 15, 22."

9. Table of Authorities, page v, line 11, change "Nimmer on Copyright" to *"Nimmer on Copyright"*.

10. Page 1, line 10, insert "to" between "entitled" and "an".

11. Page 2, line 21, change "attorneys' " to "attorney's".

12. Page 4, line 26, change "Vargas" to "Varga".

13. Page 11, line 9, change *"Lichtfield"* to "Litchfield".

14. Page 11, line 26, insert "any" between "from" and "other".

15. Page 12, line 4, change "an" to "a".

16. Page 13, line 8, change "suggest" to "suggested".

17. Page 15, line 8, change "(1988)" to "(W.D. Wash. 1988)".

18. Page 17, line 6, insert "documents" between "produced" and "to".

19. Page 20, line 4, delete "by."

20. Page 23, line 28, change "Nimmer on Copyright" to *"Nimmer on Copyright"*.

DATED: December 7, 1988

GIPSON, HOFFMAN &
PANCIONE
KENNETH I. SIDLE
VINCENT H. CHIEFFO
By /s/ Vincent H. Chieffo
VINCENT H. CHIEFFO
Attorney for Defendant
John Fogerty

[Certificate Of Service Omitted In Printing]

NORMAN G. RUDMAN, ESQ.
SLAFF, MOSK & RUDMAN
9200 Sunset Boulevard
Suite 825
Los Angeles, California 90069
(213) 275-5351
and

MALCOLM BURNSTEIN, ESQ.
CATHERINE TRIMBUR, ESQ.
BURNSTEIN AND WALKER
1231 Market Street
Penthouse
San Francisco, California 94103
(415) 893-4855

Attorneys for Plaintiff and Counterdefendant

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FANTASY, INC., Plaintiff, v. JOHN C. FOGERTY, WENAHA MUSIC CO., WARNER BROS. RECORDS, INC., *et al.*, Defendants.	CASE NO. C 85 4929 SC DECLARATION OF NORMAN G. RUDMAN IN OPPOSITION TO MOTIONS FOR AWARD OF ATTORNEY'S FEES AND COSTS
JOHN C. FOGERTY, Counterclaimant, v. FANTASY, INC., Counterdefendant.	DATE: January 6, 1989 TIME: 10:00 A.M. COURTROOM: 1 (Filed Dec 22, 1988)

I, NORMAN G. RUDMAN, declare:

1. I am an attorney at law duly admitted to practice and practicing before all the courts of the State of California and am a member of the bar of this Court. I am a member of the law firm of Slaff, Mosk & Rudman, who are co-counsel to the Plaintiff in this action. All of the facts stated in this Declaration are stated on my own knowledge, and, if sworn as a witness herein, I could testify competently thereto.

2. Before pleading the copyright infringement Complaint in this action, I, on behalf of Fantasy, took steps to attempt to assure that the action was well founded. The first of those steps was to engage the services of a musicologist. I contacted Dr. Paul Tanner, who had been consulted as a musicologist in 1972, when an action had been brought in the Federal Court in Los Angeles, claiming that a song by John Fogerty entitled "TRAVELIN' BAND" (published by Jondora Music, a Fantasy tradename) infringed the copyright of a song entitled "GOOD GOLLY MISS MOLLY". In 1972, Dr. Tanner had been a professor of music at UCLA, but had since retired.

3. I furnished Dr. Tanner with the materials we then had with respect to the two songs, that is, the recording of "RUN THROUGH THE JUNGLE" as performed on the Creedence Clearwater Revival album entitled "Cosmos Factory" and "THE OLD MAN DOWN THE ROAD" as performed on the record album entitled "Centerfield". I also furnished him a copy of the lead sheet of "RUN THROUGH THE JUNGLE" as filed with the Copyright Office in 1970. Thereafter, Dr. Tanner advised me that he found the songs to be substantially similar musically and,

after discussing his findings with him specifically, I prepared a declaration expressing those findings, which he executed on February 8, 1985. A copy of that Declaration is attached hereto as Exhibit A. Thereafter, the infringement action was filed. Dr. Tanner testified at deposition and trial and expressed the same opinion.

4. During the pendency of the litigation, I also consulted with Mr. David Megill who, though not used as an expert witness in this matter, has impressive qualifications as a musicologist. At my request, Mr. Megill also compared the music of the two songs and rendered his opinion that they are musically substantially similar.

5. Also during the pendency of the action, I consulted with Mr. Leonard Rosenman, a distinguished musicologist and composer, and who won an Academy Award in 1976 for best adaptation score in a motion picture. While Mr. Rosenman was not available to serve as an expert witness in this matter, he too, expressed the opinion to me that the music of the two songs in issue was substantially similar.

6. Prior to trial, I also consulted with Dr. Earl Spielman, a forensic musicologist who also expressed the opinion that the two songs are musically substantially similar and who testified on deposition and at trial.

7. In the preparation of the action for trial, I took the depositions of the Defendants' expert witnesses, Messrs. Harold Barlow and Gerald Eskelin. I also reviewed their reports, reflecting their opinions with respect to the issue of substantial similarity between the two songs.

(a) Mr. Barlow's report analyzed that "RUN THROUGH THE JUNGLE" was composed of 52 notes, and that "THE OLD MAN DOWN THE ROAD" had 36 notes in common with "RUN THROUGH THE JUNGLE", that is, the same notes in the same positions. On his disposition, Mr. Barlow expressed the opinion that the two songs were substantially similar "in quantity"; that in his opinion the "prior art" was what prevented them from also being substantially similar in quality; and that if the two songs were compared each to the other without reference to what Mr. Barlow characterized as "prior art" they were also substantially similar in quality. However, though Mr. Barlow referred to several Fogerty songs as "prior art", Mr. Fogerty in his deposition had denied resorting to them or any other songs in writing "OLD MAN".

(b) Mr. Eskelin's initial report listed "a number of characteristics in common" between the two songs, including

i) Folk-rock-blues style;

ii) A vocal line featuring a subtonic note on each phrase;

iii) A moderate tempo;

iv) An "instrumental" section;

v) An extended tonic-chord harmony;

vi) "Short-short-long" phrasing;

vii) A descending final phrase on tonic harmony; and

viii) A guitar figure which helps to unify the composition. (Eskelin Report, Part 1, p. 35.)

In Mr. Eskelin's opinion, as expressed in his report, those features in common did not imply copying because they were not unique to these two songs. On deposition, he testified that he regarded those characteristics in common as being of no significance because they were not unique to those songs (as he similarly testified at trial, RT 5-511). Mr. Eskelin's disregard of those common characteristics was thus based on an inappropriate standard of striking similarity rather than a standard of substantial similarity. (See RT 5-512.)

8. In his deposition in this action, Mr. Fogerty testified that there were no similarities between the melodies of the two songs that he was "aware of", and that as far as he was concerned the two songs were totally different from each other. (RT 1-25 and 26.) At trial, however, Mr. Fogerty testified differently, *viz*: that he believed that the melodies were similar to one another "in places" (RT 1-24).

I declare under penalty of the perjury laws of the State of California that the foregoing is true and correct.

Executed at Los Angeles, California, this 16th day of December, 1988.

/s/ Norman G. Rudman
NORMAN G. RUDMAN,
Declarant

MALCOLM BURNSTEIN
CATHERINE TRIMBUR
BURNSTEIN & WALKER
1231 Market Street, Penthouse
San Francisco CA 94103
(415) 863-4855

NORMAN RUDMAN
SLAFF, MOSK & RUDMAN
9200 Sunset Blvd., Suite 825
Los Angeles, CA 90069
(213) 275-5351

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FANTASY, INC., Plaintiff, vs. JOHN C. FOGERTY, WENAHA MUSIC CO., WARNER BROS. RECORDS, INC., WEA INTERNATIONAL, INC. Defendants. AND RELATED COUNTERCLAIMS	No. C 85 4929 SC (CW) DECLARATION OF ALBERT M. BENDICH IN OPPOSITION TO DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND COSTS Date: January 6, 1989 Time: 10:00 A.M. Court: One (Filed Dec. 22, 1988)

Albert M. Bendich declares as follows:

1. I have been Vice-President and General Counsel of plaintiff Fantasy, Inc. since the inception of this litigation and am familiar with the facts thereof.

2. Sometime in January, 1985 I saw the article attached to this declaration as Exhibit 1. Specifically, I saw the quotations attributed to Stuart Cook, who was once a member of the group known as Creedence Clearwater Revival ("CCR"), concerning the song "The Old Man Down the Road" ("Old Man") written by defendant Fogerty. I discussed that article with Ralph Kaffel, President of Fantasy.

3. Also, in January 1985 Saul Zaentz, a director of Fantasy, came to me and to Ralph Kaffel, and stated that Doug Clifford, also a former member of CCR, had just visited him and they had listened to a copy Centerfield Album containing Old Man. Mr. Zaentz reported that Clifford had said, in effect, that Old man was a copy of the CCR song "Run Through the Jungle" ("Jungle"), and that "John can't write a hit song without ripping off Creedence."

4. Thereafter, Mr. Kaffel and I listened to the songs Old Man and Jungle. We discussed the matter and concluded that, the songs sounded alike to us. The issue was left in my hands as General Counsel of Fantasy to investige [sic] and to take whatever steps appeared appropriate. I then determined to get expert musicological and legal advice before I made any decisions. I thereupon contacted Norman Rudman and asked him to look into the matter.

5. Within a very short time I received Mr. Rudman's opinion and advice together with a copy of the report of Dr. Paul Tanner, concluding that Old Man was substantially similar to Jungle. Mr. Rudman advised me that a copyright action was indicated and I authorized him to

proceed. As Fantasy's General Counsel I thereupon, and without further discussion with any of the officers or directors of Fantasy, authorized Mr. Burnstein and Mr. Rudman to proceed to make a claim for copyright infringement. Specifically, I did not solicit the opinion of Mr. Zaentz as to this latter decision.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Berkeley, California this 21st day of December, 1988.

/s/ Albert M. Bendich
ALBERT M. BENDICH

MALCOLM BURNSTEIN
CATHERINE TRIMBUR
BURNSTEIN & WALKER
1231 Market Street, Penthouse
San Francisco CA 94103
(415) 863-4855

NORMAN RUDMAN
SLAFF, MOSK & RUDMAN
9200 Sunset Blvd., Suite 825
Los Angeles, CA 90069
(213) 275-5351

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FANTASY, INC., Plaintiff, vs. JOHN C. FOGERTY, WENAHA MUSIC CO., WARNER BROS. RECORDS, INC., WEA INTERNATIONAL, INC., WARNER COMMUNICATIONS, INC., WEA MANUFACTURING, INC., WEA CORPORATION, Defendants.	No. C 85 4929 SC PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS Date: January 6, 1989 Time: 10:00 A.M. Court: One
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INTRODUCTION

Contrary to the unfounded assertions of defendants, this litigation was neither frivolous nor prosecuted in bad faith. In fact, we believe that defendants file this motion for attorneys, fees with no real belief in its merits. Before the filing of the instant motion, for example, defendants's lawyer (Mr. Sidle) and plaintiff's counsel (Mr. Burnstein) had a conversation during which Mr. Sidle asked if plaintiff would pay defense attorneys, fees; plaintiff refused, stating that the law of this Circuit is to deny fees under facts similar to those of the case at bar. Burnstein Decl. ¶2. Thereafter, counsel for plaintiffs and defendants met to discuss resolution of all outstanding issues. In the course of that meeting, counsel for plaintiff advised Mr. Sidle that it was not conducive to such discussions for him to make such untenable demands as counsel fees. Twice, Mr. Sidle responded by saying, "That was just a settlement proposal." *Id.* ¶3. Such comment indicates the lack of seriousness with which that demand was, and is now, made, despite the rhetoric that pervades the defendants' moving papers.

THE FACTS

Fogerty wrote "Run Through the Jungle" ("Jungle") in 1970 when he was a member of the recording group Creedence Clearwater Revival (hereinafter "CCR"). CCR was made up of four musicians: Fogerty, his elder brother Tom Fogerty, Douglas Clifford, and Stuart Cook. CCR recorded Jungle. Fantasy currently owns the copyright thereto. *Fantasy v. Fogerty*, 664 F.Supp. 1345, 1349 (N.D.Cal. 1987).

In 1984, Fogerty wrote a song called "The Old Man Down the Road" (hereinafter "Old Man"). Old Man was released as a single record in early December 1984, and on the album "Centerfield" in January 1985. Very shortly after the album was released, Stuart Cook and Douglas Clifford (of CCR) were quoted in the Los Angeles Times, the San Francisco Chronicle, and/or other publications as stating that Old Man was, in essence, a copy of Jungle. Fantasy executives were aware of those quotes. *See* Declaration of Albert Bendich in Opposition to Motion for Attorneys Fees (hereinafter "Bendich Decl."), ¶2 and Exhibit 1; Declaration of Malcolm Burnstein in Opposition to Motion for Attorneys' Fees (hereinafter "Burnstein Decl."), ¶15.

At about the same time that the Cook interview appeared, Douglas Clifford met with Saul Zaentz, a director of Fantasy. They listened to Centerfield, including Old Man. Clifford said, in effect, that Jungle was similar to Old Man, and that "[Fogerty] couldn't write a hit song without ripping off Creedence." *See* Declaration of Saul Zaentz in Opposition to Motion for Attorneys' Fees (hereinafter "Zaentz Decl."), ¶2. At about the same time, Mr.

Clifford wrote a letter to the Chronicle accusing Mr. Fogerty of copying his earlier work. *See* Burnstein Decl. ¶15 and Exhibit 3. Mr. Clifford [sic] Both Cook and Clifford stand to be financially harmed if Fogerty successfully steals the material which he wrote and CCR recorded, for the CCR records still sell and the other members of the band receive royalties for each record sold. *See* Burnstein Decl. ¶4. Fantasy has an obligation to the other members of CCR, as well as its self interest, in protecting the integrity of the copyrights it owns.

After the Clifford visit, Mr. Zaentz consulted with Ralph Kaffel, President of Fantasy, and Albert Bendich, Vice President and General Counsel. Zaentz Decl. ¶3; Bendich Decl. ¶3; Declaration of Ralph Kaffel in Opposition to Motion for Attorneys' Fees (hereinafter "Kaffel Decl."), ¶2. Phil Jones, Fantasy's Executive Vice-President, who is very well versed in popular music also compared the songs and found them substantially similar. Kaffel Decl. ¶3. The matter was left in the hands of Mr. Bendich, General Counsel of Fantasy, for appropriate investigation and action. Bendich Decl. ¶4; Kaffel Decl. ¶4; Zaentz Decl. ¶3. He determined to obtain expert musicological and legal advice, and he did so. Bendich Decl. ¶¶4-5. Mr. Bendich consulted Mr. Rudman, who retained Dr. Paul Tanner, an independent musicologist, to do a comparison of the songs. Declaration of Norman G. Rudman in Opposition to Motion for Attorneys Fees (hereinafter "Rudman Decl."), ¶¶2-3. Dr. Tanner had previously been a witness *for* Fogerty in a copyright infringement suit. *Id.* at ¶2; 2 R.T. 71:20-72:6. Dr. Tanner rendered a report, a copy of which is attached to the Rudman Declaration. *Ibid.*; Rudman Decl. ¶3 and Exhibit A

thereto. A musician and musical scholar of many years experience (1 R.T. 76:20-85:13), Dr. Tanner concluded that the melodies of the two songs were substantially similar. Because access was never at issue – Fogerty having written both songs – once substantial similarity was established, copying was inferred and the burden shifted to defendants to prove independent creation. *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1018-19 (9th Cir. 1985), *cd* 474 U.S. 1059 (1986); Jury Instruction No.23.

Three other musicians and scholars also examined the compositions in question at Fantasy's request. After independent analysis, Dr. Earl Spielman and David Megill (both of whom appeared at the trial) concluded that the songs were substantially similar. Rudman Decl. ¶¶4, 6; Burnstein Decl. ¶5. Further, Leonard Rosenman, musical scholar and winner of an Academy Award for music, compared the songs for plaintiff's counsel and came to a similar conclusion. *Ibid*; Rudman Decl. ¶5.

The expert witnesses who testified for plaintiff did so with no objection from defendants as to qualifications and no voir dire on that issue. We therefore presume that defendants concede their qualifications. Each of Fantasy's experts testified that substantial similarity and copying existed. 2 R.T. 48:7-15, 78:2-22, 121:3-8, 134:3-18. Defendants therefore lack a legitimate basis for arguing that plaintiff's claim, or any aspect of it, was frivolous.

Further, defendants' experts were essentially split on the issue, with Mr. Barlow concluding that the songs were substantially similar, at least "in quantity", but Dr.

Eskelin concluding that there were no significant similarities. Rudman Decl. ¶7. Dr. Eskelin conceded, however, that, to the ear not as well trained as his, Jungle and Old Man "really [sound] like the same tune". 5 R.T. 544:21-545:5. Thus, even the testimony of the defense experts cannot be construed as evidence that the claim of substantial similarity was frivolous.

With respect to plaintiff's corporate "good faith", the following is clear: Long before suit was filed, two members of CCR, those who would presumably know Jungle better than anyone else, stated either publicly or to a Fantasy director (or both) that Old Man was copied from Jungle. A respected musical scholar, with no reason to have any hostility towards Mr. Fogerty, had similarly concluded that the songs were substantially the same and had so informed Fantasy. Fantasy's counsel thereupon wrote to Fogerty and Warner Bros. and made its claim for infringement. Burnstein Decl. ¶6. Neither Fogerty nor Warner Bros. responded to the letter from Fantasy's counsel. *Ibid*. Fantasy did not file its suit for several months, in order to allow defendants time to make a counter-argument to the infringement claim. *Ibid*. Yet neither defendant even bothered to investigate the validity of Fantasy's claim until long after suit was actually filed. (The defense experts testified that they had not been retained until 1986.)

We do not attempt to reargue here the merits of plaintiff's claim; but merely to demonstrate the lack of merit to any argument of bad faith or frivolity. If defendants had honestly believed that the infringement claim was frivolous, they could have filed a motion for summary judgment on the issue of similarity or copying.

They did not. Both defendants did, on the other hand, move for a directed verdict at the conclusion of the plaintiff's case. 3 R.T. 246:11-247:10. That motion was summarily denied on the basis that the issues were substantial enough to present jury questions. 3 R.T. 248:4-6. Obviously, therefore, plaintiff's case was not frivolous as a matter of law.

ARGUMENT

I. THERE IS NO EVIDENCE THAT THE INFRINGEMENT CLAIM WAS EITHER FRIVOLOUS OR BROUGHT IN BAD FAITH.

Attorney fee awards to prevailing defendants in a copyright action should be made circumspectly to avoid chilling a copyright holder's incentive to sue on colorable claims. *McCulloch v. Albert E. Price, Inc.*, 823 F.2d 316, 322-23 (9th Cir. 1987). Thus, the Court may award attorneys' fees to a prevailing defendant only upon a finding of bad faith or frivolity. *Olson v. NBC*, 855 F.2d 1446, 1454 (9th Cir. 1988); *Cooling Systems and Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485, 493-94 (9th Cir. 1985).

An action is frivolous if the result is obvious or the arguments presented are wholly without merit. *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1156 (9th Cir. 1986). However, even a weak argument on substantial similarity is sufficient to preclude a finding of frivolity. *See v. Durang*, 711 F.2d 141, 144 (9th Cir. 1983) (per curiam). Further, hindsight logic should not be employed in judging the merit of a plaintiff's claim. The Supreme Court has cautioned lower courts to "resist the

understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, [the] action must have been unreasonable and without foundation. This kind of hindsight logic would discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978), *quoted in Roth v. Pritikin*, 787 F.2d 54, 58 (2d Cir. 1986). That caution is most important where the court is dealing with the "intrinsic test" of substantial similarity, for there the most subtle and complex distinctions must be made by the trier of fact. *Baxter v. MCA, Inc.*, 812 F.2d 421, 424 (9th Cir. 1987).

To establish bad faith, defendants would have to show either that Fantasy knowingly or recklessly asserted a frivolous claim or argument, *i.e.*, one entirely without color, or that Fantasy raised a meritorious claim for reasons of harassing an opponent or for some other improper purpose. *Estate of Blas through Chargualaf v. Winkler*, 792 F.2d 858, 860 (9th Cir. 1986) (bad faith showing required for 28 U.S.C. §1927); *Nemeroff v. Abelson*, 620 F.2d 339, 348 (2d Cir. 1980) (showing required for bad faith exception to the general American rule governing attorneys' fees), *aff'd after remand*, 704 F.2d 652 (2d Cir. 1983). Note, however, at least in the context on Rule 11, that "improper motives" for filing a lawsuit do not constitute bad faith or harassment where the complaint is well grounded in fact and warranted by existing law. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 832 (9th Cir. 1986).

Defendants contend that Fantasy and Saul Zaentz brought and prosecuted this action in bad faith. The bad

faith, they argue, is demonstrated by the motive of prosecuting the lawsuit to punish Fogerty, by the reversal of Fantasy's prior legal position that Fogerty's earlier works were independently created, and by a settlement proposal made in September 1986. Defendants also allege that the action was frivolous, in whole and in the context of certain arguments advanced at trial. Each of defendants' arguments lacks merit, both legal and factual. Nothing offered by defendants is sufficient to satisfy their burden of proving entitlement to fees.

A. Defendants' References to Zaentz's "Bad Faith" are a Red Herring and Untrue.

Defendants state, without equivocation, that "Saul Zaentz admitted that he holds great personal animosity against John Fogerty." Defendants' Memo at 7. Quoted and cited as authority for that startling statement are a few questions and answers in Mr. Sidle's cross-examination of Mr. Zaentz. 8 R.T. 908:11-17. But those questions and answers reveal *only* that Mr. Zaentz was the victim of a personal vendetta against him by Fogerty, they do not evidence any enmity on the part of Mr. Zaentz against Fogerty. Nor is there any other such evidence. If, despite *Zaldivar v. City of Los Angeles*, 780 F.2d at 832, the motive of anyone connected with the plaintiff can be considered relevant, no improper motive appears herein. What are the facts:

1. Defendants claim that Mr. Zaentz, "at the merest pretext . . . [seeks] to vex and harass Fogerty by abusing the court system and bringing . . . frivolous actions against Fogerty." Defendants' Memo at 8. But it was

Fogerty who, in September 1980, served Mr. Zaentz as a Doe defendant in a suit Fogerty had filed in March 1978 (30 months earlier) against his lawyers and accountant over money he allegedly lost in a foreign bank. Burnstein Decl. ¶14. California Code of Civil Procedure §474 provides that plaintiffs in California may bring into lawsuits previously un-named parties as "Doe" defendants where, at the time suit was filed, the plaintiff either does not know the identity of a defendant or does not know that a person was responsible for the loss the plaintiff suffered. *Joslin v. H.A.S. Insurance Brokerage*, 184 Cal. App. 3d 369, 376, 228 Cal. Rptr. 878, 882 (1986); *Munoz v. Purdy*, 91 Cal. App. 3d 942, 946-47, 154 Cal. Rptr. 472, 475 (1979). In such cases, the date of the complaint against the "new party" relates back to the initial filing of the lawsuit. *Ibid.* Fogerty says that he sued Mr. Zaentz "to recover his life savings" because Fogerty's entry into the "scheme" in which the money was lost was due to the "recommendation" of Mr. Zaentz. Defendants Memo at 7. Never mind that "recommendation" is not a tort; if Mr. Fogerty actually believed the foregoing, he was required to name Mr. Zaentz as a defendant when the suit was originally filed. Not having done so, he lost his case against Mr. Zaentz because the misuse of the "Doe" statute did not toll the statute of limitations. *See* Declaration of Judge John Dearman attached to Burnstein Decl. as Exhibit 2 thereto. Mr. Zaentz, not unnaturally, filed a malicious prosecution action as a result of that lawsuit.

2. It was Fogerty who, in 1984, wrote a song that, according to other members of CCR and numerous critics, was a steal of the Fantasy-owned song Jungle.

3. And it was Fogerty who, in 1984, wrote a song about Mr. Zaentz calling him a thief and a pig ("Zanz Kant Danz"). (*See* 10 R.T. 1136:15-1137:17.) That song caused Mr. Zaentz to sue Mr. Fogerty for defamation.

Thus, it is clear that the vendetta is, so to speak, on the other foot. Further, the feelings that Mr. Zaentz had or have about Mr. Fogerty are of little relevance to the issue before the Court.

Fantasy, not Mr. Zaentz, undertook to sue defendants for copyright infringement, and then only after receiving credible opinions from various sources that Old Man infringed Jungle. Mr. Zaentz did not, and could not have made this decision; he is not "the owner" of Fantasy. *See, e.g.* Zaentz Decl. ¶ 3; Bendich Decl. ¶ 5. Mr. Zaentz is not even an officer of Fantasy. Burnstein Decl. ¶ 7. Nothing in the record supports defendants' contrary assertion.[1] Indeed, Fogerty and his counsel were informed long before the proceedings that Zaentz did not own Fantasy. Burnstein Decl. at ¶ 7. Even a minimum investigation, let alone one of the nature required by Rule 11, would prevent such an assertion. But Fogerty was determined to show a history of hostility between himself and Mr. Zaentz (it would be more factually accurate to refer to the hostility Fogerty has towards Mr. Zaentz). He now attempts to mislead the Court into believing that that

[1] Had that been an issue in the case, other then as a red herring dragged, by inference, into the shameful cross-examination of Mr. Zaentz, plaintiff would have introduced evidence showing that Mr. Zaentz owns about 7% of the partnership that owns all of the common stock of the company. Neither Mr. Zaentz nor that partnership own any of the preferred stock.

hostility between them, not suspected plagiarism, was the cause of the lawsuit.

Whoever owns Fantasy, the decision to file the suit was made without the participation of Mr. Zaentz. *See* Bendich Decl. ¶ 5. Moreover, that decision was made only after (1) the copying had been suggested to Fantasy by two former members of CCR and several critics; (2) the company president and other officers had listened to the songs and found them similar; (3) counsel had been consulted; and (4) expert legal and musicological opinions indicating a copyright violation had been obtained. *See, e.g.* 8 R.T. 907:13-908:4; Bendich Decl. ¶¶ 2-5; Kaffel Decl. ¶¶ 2-4; Zaentz Decl. ¶¶ 2-3; Burnstein Decl. ¶ 6. Had Mr. Zaentz's alleged "vendetta" against Fogerty been a motivating force, why would *Fantasy* have bothered with the foregoing? To believe that Mr. Zaentz's alleged hostility to Mr. Fogerty was the genesis of this litigation would be to ignore the foregoing facts, as well as the fact that Warner Bros. Records was also named as a defendant.

Even were Mr. Zaentz's motives at issue in this matter, it is difficult to ascribe to him the degree of vindictiveness necessary to embroil his associates in complicated, lengthy and expensive litigation for mere personal satisfaction. Mr. Zaentz, who has produced several major motion pictures ("One Flew Over the Cuckoo's Nest", "Amadeus" and "Mosquito Coast" – the latter distributed by Warner Bros., a sister company of Warner Bros. Records) and won two best picture "Oscars" therefore, should not be presumed to be so petty or so unintelligent as to act so lightly against his self-interest or that of his close associates. *See* Burnstein Decl. ¶ 8.

Thus, defendants have failed to demonstrate that Mr. Zaentz had anything to do with the decision to file this action or that such decision was improperly motivated in any event. What is apparent is that Mr. Fogerty improperly sued Mr. Zaentz in 1980, wrote a vicious song about him in 1984, and spent a great deal of time attacking both Mr. Zaentz and Fantasy to the media. If he now gets a rise out of Mr. Zaentz for any of the foregoing, he accuses Mr. Zaentz of engaging in a vendetta. We trust such argument will fall of its own, ungainly weight.

B. *Fantasy Has Not Asserted Frivolous Claims.*

Defendants contend that Fantasy's arguments of infringement were frivolous. Defendants' Memo at 8. They first mischaracterize Fantasy's position with reference to the warranty issue by arguing that Fantasy asserted that the warranty prevented defendants from introducing evidence of Fogerty's "style." Fantasy actually argued that the "prior art" defense to the claim of substantial similarity was improper in the presence of the warranty. While the Court ruled for defendants on that issue, we hardly believe it was frivolous. By warranting that the music in Jungle, and *all parts thereof* were "new, original and capable of copyright protection", we submit that Fogarty precluded himself from arguing that "prior art", consisting of songs he wrote before Jungle, in any way defeated or minimized Fantasy's claim of substantial similarity. Even if Fantasy's argument is erroneous, it cannot be said to be in bad faith or without reasonable belief in its validity.

Contrary to defendants argument to this Court, Fantasy could not have sued for breach of warranty on the basis of an argument, first made in 1986 as a defense to the copyright claim, that earlier Fogerty songs were similar to (but did not copy) Jungle, for Fantasy does not contend that earlier Fogerty works are so similar to Jungle as to invoke the warranty.

Cooling Systems & Flexibles, Inc. v. Stuart Radiators, Inc., 777 F.2d 485 (9th Cir. 1985), cited by defendants, is of no aid to them. The "works" in *Cooling Systems* were factual catalogues which, in the words of the Ninth Circuit, "contain a great many unprotectible facts and very little protectible expression of arrangement of those facts." *Id.* at 491. The Court went on to unequivocally state that "copyright law considers factual works to be fundamentally different from more artistic works. . . ." *Ibid.* In fact, the Court reaffirmed its position that, with factual material, near identity was required to demonstrate substantial similarity. *Id.* at 491-2. When dealing with artistic and creative works, as are undoubtedly involved in the case at bar, the *Cooling Systems* case appears singularly inapposite.

Defendants next contend that it is frivolous to allege that Fogerty must have copied Jungle in writing Old Man. Far from frivolous, if the songs are substantially similar, the most reasonable conclusion that can be drawn is that the latter was copied from the former. Indeed, the law shifts the burden of proof to the defendant on the issue of copying once access and substantial similarity have been established. *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F2d 1001, 1018-19 (9th Cir. 1985); *cd* 474 U.S. 1059 (1986).

Finally, defendants label "absurd" Fantasy's argument that differences between performances of the same song by different artists were relevant to show that such variations were greater than the disparities alleged by defendants to exist between Jungle and Old Man. We submit that the absurdity, if any, lies in a failure to recognize the relevance of such evidence in the face of expert testimony produced by the defense which stressed minute differences in the performances of the two songs at issue. Plaintiff was attempting to show that "performance style", which may create apparent differences, did not affect the basic and intrinsic similarity between Jungle and Old Man.

C. *There Has Been No Reversal of Fantasy's Position Concerning Fogerty's Earlier Works.*

Defendants claim that the "strongest indicia of . . . bad faith" is that Fantasy's claim of copying constitutes a reversal of Fantasy's prior legal position that Fogerty's songs did not copy each other. Defendants' Memo at 10. Defendants make this claim undeterred by the knowledge that there has been no reversal of position at all. That is to say, Fantasy neither did nor does claim that the songs Fogerty wrote prior to Jungle were copied when he wrote Jungle. Fantasy does claim that Old Man is copied from Jungle, but that is not inconsistent with saying that Jungle is not copied from, for example, "Keep on Chooglin." Defendants claim that the admitted similarity between Jungle and Old Man was based on compositional devices used by Fogerty in earlier songs. Fantasy contends that the similarities between Jungle and Old

Man far transcend any similarities that might have existed between Jungle and earlier songs. While Fantasy's expert noted some similarity between Jungle and Fogerty's earlier works, neither he nor anyone else ever suggested that Jungle infringed the copyright, or was substantially similar to, any earlier Fogerty song. Thus, the issue of copying as to those earlier works does not arise.

With reference to Fantasy's alleged knowledge of Fogerty's ability to create similar songs independently, there is simply nothing in the record to support any such statement and defendants cite the Court to none. Certainly Fantasy was aware of the similarity of style Fogerty used in some of his songs; but that is a far different cry from similarity of melody – of both verse and chorus – which was the case of the two songs at issue herein. Similarity of style was not, of course, Fantasy's claim, and Fantasy so informed the jury. 10 R.T. 1051:23-1052:4, 1138:14-23. Thus, while in 1988 Dr. Spielman saw similarities between, for example, Green River and Jungle, that says nothing about Fantasy's knowledge at any time, and it ignores the fact that the similarities found by Dr. Spielman between those compositions were, in his opinion, relatively insignificant.

In any event, we might also recall for the Court Dr. Spielman's straightforward explanation of the tort committed in this case: "You know, what's wrong is selling the song to – selling the song twice. . . . But there's nothing wrong with copying oneself. It's a very well known tradition." 2 R.T. 145:15-17. The essence of Fantasy's claim was always that Fogerty had sold this song (Jungle) to it, and later (via Old Man) sought to regain the

same song, and the profits therefrom, for himself. A number of musical experts concurred with Fantasy on that point.

D. *Fantasy's Settlement Proposal Was A Good Faith Effort to Settle This Litigation.*

In one of their more cynical arguments, defendants contend that Fantasy failed to make any good faith effort to settle this case. When the case commenced, Fantasy's counsel spoke to Mr. Sidle and said that Fantasy was interested in settlement but, in view of Fogerty's attitude (he had been quoted in numerous articles around the country attacking Fantasy for the six month period before suit was filed), Fantasy did not know if he was interested in settlement. Burnstein Decl. ¶¶ 9-10. Mr. Sidle was asked to report if Fogerty had such an interest. *Id.* ¶ 10. On several subsequent occasions Fantasy renewed its offer to discuss settlement. *Ibid.*

Mr Sidle never responded to any such request; indeed, he never dealt with settlement at all until after plaintiff sent the settlement proposal dated September 10, 1986, a copy of which is attached to the Chieffo Declaration. It should be noted that even then, no response was received from defendants for nine months. Then, only four days before a pre-trial statement was due to be filed with this Court, defendants offered only a mutual dismissal of all claims, including those in two wholly separate actions brought by Mr. Zaentz. Burnstein Decl. ¶ 11. The time records submitted by defendants counsel reveal that no settlement analysis was undertaken nor was any other time devoted to settlement until June 1987 – almost

two years after the suit was filed. *See* Declaration of Kenneth Sidle in Support of Defendants Motion for Costs and Attorneys' Fees, Exhibit A, pp. 1-10.

Several times during the pendency of the litigation, counsel for the Warner defendants hinted that they would be interested in a settlement, but that Fogerty, who controlled the litigation due to an indemnification to Warner Bros., refused to discuss settlement. Burnstein Decl. ¶ 10.

Defendants never indicate the manner in which plaintiff's September 1986 settlement offer constitutes bad faith; they merely call it "absurd." Defendants' Memo at 13. Yet as of March 1985 Warner Bros. Records had a net profit from the record "Centerfield" of over $3,025,000.00; Fogerty had a profit from Warner Bros. sales of Centerfield of approxiamtely $3,700,000.00, and had additional profits of $100,000.00 attributable solely to Old Man. Burnstein Decl. ¶ 12, and Exhibit 1 attached thereto. The foregoing figures do not take into account profits of WEA International or any profits from the sales of Old Man or Centerfield by WCI's foreign subsidiaries. Fantasy had a compelling argument that 37% of the profits from Centerfield should be allocated to Old Man because Old Man was used as the primary vehicle for the promotion and sale of Centerfield. *See Frank Music Corporation v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505 (9th Cir. 1985). Defendants' exposure was thus in excess of $2,500,000.00, and Fantasy's settlement proposal appears, therefore, to represent a reasonable settlement approach, to which defendants never actually responded.

E. *It Is Offensive and Incorrect to Suggest That an Award of Fees Is Necessary to "Deter" Fantasy from Filing Unmeritorious Claims.*

Defendants seek an award of more than a million dollars in order to "deter" Fantasy from filing future, unmeritorious copyright actions. Defendants Memo at 13-14. In this argument, defendants confuse defeat in a hotly contested case with bad faith or frivolousness. If defendants' theory were the law, every losing litigant would be liable for such fees, thus negating the legal principles adumbrated above as to the duty of the courts to award fees only in cases of clear abuse so that copyright holders will not be deterred from protecting their interest in the copyrights. *See* pp. 6-7, *supra*.

Fantasy has filed one copyright infringement suit against Mr. Fogerty, although Fogerty has written approximately 25 songs since Fantasy ceased to have any rights to his new compositions. Burnstein Decl. ¶ 13. Fantasy has not claimed infringement with respect to Fogerty songs on the album entitled "John Fogerty", other songs on "Centerfield", or on the later-released "Eye of the Zombie." In this lawsuit, solid expert evidence supported Fantasy's claim. This record affords no cause to legitimately argue for either the punishment of Fantasy or any need to protect defendants from "abuse of the copyright laws."

II. FOR JUDICIAL ECONOMY AND TO CONSERVE THE RESOURCES OF THE LITIGANTS, IT IS REASONABLE TO BIFURCATE THE QUESTION OF ATTORNEYS FEES AND COSTS, THE PARTIES HAVE AGREED TO SUCH BIFURCATION, AND THE COURT SHOULD NOT MAKE A FEE AWARD AT THIS TIME EVEN IF IT FINDS THAT SOME FEES ARE APPROPRIATE.

Even were the Court to decide that some award of fees and additional costs is appropriate, the documentation heretofore submitted is inadequate to establish the reasonableness of the requested fees. For example, the affidavits submitted are insufficient to establish that the rates sought are in line with generally prevailing rates. *See Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984). Fantasy objects on a number of grounds to the amounts claimed by defendants, and would need adequate time to do discovery. The following are just a few apparent problems on which additional facts are required: (1) hours are charged for attorneys or others as to whom no information is provided; (2) many of the hours are obviously related to work on the counterclaims, on which plaintiff prevailed; (3) additional hours relate to fighting sanctions and moving to reconsider them, and, as a matter of public policy, it is difficult to see how such legal work is properly recoverable by a fee motion; and (4) a large number of hours charged for things that do not, on their face appear to bear any relationship to the case (such as conference with "California Lenders and Attorney Service" in July 1986).

There are many other areas of concern with the submitted material, not the least of which is that the

defendants' alleged billings are not broken down into sufficient detail, such as daily activity, to justify a fee award. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *Keith v. Volpe*, 644 F.Supp 1317, 1322 (C.D. Cal. 1986); *aff'd*, 858 F.2d 467 (1988). We respectfully request that the Court honor the stipulation of the parties, submitted herewith, and, if it determines that any award is proper under applicable standards, give the parties time to conduct sensible discovery on the amount of reasonable fees and costs.

CONCLUSION

Under the principles of law applicable to attorneys' fees requests by prevailing defendants in copyright cases, recovery is barred except on a showing of bad faith or frivolousness on the part of the plaintiff. The record herein demonstrates a good faith, albeit unsuccessful, effort on the part of Fantasy to protect and defend a valuable copyright against what it had good reason to see as a flagrant violation by defendants. Given the support of expert witnesses, the failure of the defendants to seek summary judgment, and the refusal of the Court to grant defendants' motion for a directed verdict after the plaintiff had rested, none of Fantasy's claims can be said to be frivolous as a matter of fact, let alone a matter of law. Defendants should not be granted either attorneys' fees

or costs (over and above what is proper in a cost bill), and their motion should be denied.

Dated: December 22, 1988

Respectfully submitted,

MALCOLM BURNSTEIN
CATHERINE TRIMBUR
BURNSTEIN & WALKER
and
NORMAN G. RUDMAN
SLAFF, MOSK & RUDMAN

by /s/ Malcolm Burnstein
MALCOLM BURNSTEIN
Attorneys for Plaintiff

[Certificate Of Service Omitted In Printing]

GIPSON, HOFFMAN & PANCIONE
A Professional Corporation
KENNETH I. SIDLE
VINCENT H. CHIEFFO
1888 Century Park East
Suite 1777
Los Angeles, California 90067
(213) 556-4660

RUDIN AND APPEL
MILTON A. RUDIN
JOSEPH L. GOLDEN
9601 Wilshire Boulevard
Suite 800
Beverly Hills, California 90210

Attorneys for Defendants

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FANTASY, INC., Plaintiff, vs. JOHN C. FOGERTY, et al., Defendants.	CASE NO. C-85-4929-SC (CW) REPLY MEMORANDUM OF DEFENDANTS IN SUPPORT OF MOTIONS FOR FULL COSTS INCLUDING REASONABLE ATTORNEYS' FEES
AND RELATED CROSS-ACTIONS	Date: January 6, 1989 Time: 10:00 a.m. Courtroom: 1 (Filed Dec. 30, 1988)

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I.
INTRODUCTION

The opposition of Fantasy, Inc. ("Fantasy") to Defendants' Motion For Costs, Including Reasonable Attorneys' Fees, is as make-weight and frivolous as was the instant copyright infringement claim it commenced against John Fogerty in 1985. Fantasy's opposition starts by unethically (and falsely) quoting from confidential settlement discussions in an incredible effort to argue that defendants are not "serious" about the instant motion. Fantasy goes on to rely extensively upon purported statements of former members of John Fogerty's band, Creedence Clearwater Revival, all of which are obviously inadmissible hearsay. If Messrs. Cook, Clifford, and Tom Fogerty had any evidence to give in this case regarding the claim of copyright infringement against John Fogerty, one would have expected them to testify at trial. They did not, and Mr. Clifford, for one, has stated under oath that Mr. Zaentz's testimony at trial and in his declaration regarding the purported events of a meeting with Clifford was false. Fantasy goes so far as to submit a 1986 declaration of a judge of the California Superior Court, supposedly explaining the basis of his 1982 decision in a completely unrelated matter. Other than demonstrating that Mr. Burnstein somehow has the ability to induce a judge to sign such an extraordinary, and inadmissible, declaration, the point of this display is a mystery.

Nothing in Fantasy's opposition should prevent this Court from awarding to defendants their full costs and reasonable attorneys' fees. Fantasy makes only two arguments. First, it claims that because the two Fogerty songs were similar enough to allow the case to be decided by

the jury, then its infringement claim cannot, as a matter of law, be frivolous. Second, Fantasy asserts that Saul Zaentz had no involvement in prosecuting this copyright claim and, therefore, his personal animosity toward Fogerty and his desire to punish Fogerty is irrelevant to whether or not the action was brought in bad faith. Neither of these arguments is persuasive.

The Ninth Circuit authority is clear that merely surviving to trial does not prevent the finding that a copyright claim is frivolous. This extraordinary copyright infringement claim which asserted that a composer of the stature of John Fogerty had copied himself cannot be easily explained away by the technical niceties of an evidentiary presumption. The central issue in this copyright infringement case was copying. Fantasy does not claim that anyone, including Zaentz, ever believed that Fogerty had copied himself when he wrote "OLD MAN DOWN THE ROAD."

Obviously, this case was not brought because anyone ever believed that Fogerty had copied himself. Rather, the case was brought to satisfy Zaentz's emotional needs and to satisfy his desire to gain revenge upon Fogerty for what Zaentz, and his attorneys, believed to be good grounds. Fantasy's argument that Zaentz had nothing to do with the prosecution of this infringement case is patently incredible and is contradicted by the undisputed facts. He was the only witness called by Fantasy on the issue of the commencement of this lawsuit.

This case was brought in bad faith and is frivolous, and this Court should award full costs and attorneys' fees to defendants.

II.

FANTASY CANNOT ESCAPE LIABILITY FOR DEFENDANTS' COSTS AND ATTORNEYS' FEES MERELY BECAUSE THE INFRINGEMENT CLAIM WAS TRIED TO A JURY VERDICT.

Fantasy's argument that, merely because the songs were similar enough to reach the jury on the issue of infringement, its claim cannot be frivolous is simply incorrect under the Ninth Circuit's decision in *Cooling Systems & Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485 (9th Cir. 1985). Fantasy does not bother to discuss that aspect of the *Cooling Systems* decision which affirmed the award of costs and attorneys' fees, and which found the infringement claim to be frivolous, even though the Ninth Circuit had previously reversed a defense grant of summary judgment and ordered the infringement claim to trial.

Fantasy does correctly point out that, in *Cooling Systems*, the Ninth Circuit required that the higher standard of near identity be applied before infringement could be found with respect to the works there at issue. This standard of similarity, which is much higher than "substantial similarity," was applied because the works at issue in *Cooling Systems* were more factual than the creative works in the instant case. But this does nothing to assist Fantasy. By its prior reversal of the grant of a defense summary judgment motion, the Ninth Circuit obviously felt that a reasonable jury could have found that the two catalogs in question were nearly identical. *Cooling Systems & Flexibles, Inc. v. Stuart Radiators, Inc.*, 711 F.2d 1062 (9th Cir. 1983). Despite the fact that the Ninth Circuit found that the works were similar enough

to allow a jury to conclude that they were nearly identical, the District Court, after trial, found that the case was frivolous, brought in bad faith, and granted attorneys' fees and costs. The Ninth Circuit affirmed. *Cooling Systems, supra*, 777 F.2d at 493. The instant case was allowed to go to the jury upon a standard of similarity much less stringent than the "nearly identical" standard applied in the *Cooling Systems* case. As in *Cooling Systems*, however, this fact does not preclude this Court from concluding that the infringement claim asserted by Fantasy was frivolous or was brought in bad faith.

III.

FANTASY NEVER HAD ANY BELIEF THAT FOGERTY HAD COPIED HIMSELF.

Fantasy makes no effort to demonstrate any belief of anyone that Fogerty actually copied himself when he wrote "OLD MAN." Fantasy has submitted the declarations of Zaentz, Bendich and Kaffel. Not one of them expresses the personal opinion that they believed Fogerty had copied himself. At best, Bendich's declaration states that he decided to commence the copyright infringement claim because Norman Rudman "advised [him] that a copyright action was indicated." Bendich Declaration, ¶ 5. This "advice" from Mr. Rudman is not explained in Rudman's Declaration, but it was apparently based upon a report provided by Mr. Tanner, a musicologist hired by Fantasy and who eventually testified at the trial. At the time of his deposition herein, more than a year after the filing of the lawsuit, Tanner expressed no belief one way or the other as to the crucial issue of copying, but only opined as to musical similarities between the two Fogerty

compositions and made no analysis of any prior art, particularly including other Fogerty compositions, to determine whether any similarities found between the two songs were explained by independent creation by Fogerty, rather than by copying.

Fantasy also seems to place the blame for the commencement of this litigation upon the purported statements of former members of John Fogerty's band, Creedence Clearwater Revival. Through a series of inadmissible multiple hearsay statements, Fantasy seems to say that Doug Clifford claimed Fogerty had committed copyright infringement. This hearsay evidence is refuted by the Declaration of Mr. Clifford who states, under oath, that Mr. Zaentz's testimony regarding his meeting with Clifford is "false."

Clifford states:

"5. I did have an occasion to meet with Mr. Zaentz in 1985. However, this meeting did not happen as Mr. Zaentz says.

6. I did not bring the idea up to Zaentz at this meeting of suing John for copyright infringement. I certainly did not bring the 'Centerfield' album with me to the meeting or play any songs from that album for Mr. Zaentz. I also did not say to Mr. Zaentz that 'John can't write a hit song without ripping off Creedence.' I never felt that the release of an album by John would have a negative impact on the sales of CCR product. Stu Cook and I were happy that John was coming out with a new album because we felt it would boost the sales of CCR albums, which it has.

7. During the trial on this matter, I was contacted by Mr. Malcolm Burnstein and asked if I would testify on behalf of Fantasy, Inc. I told Mr. Burnstein that I would not."

Declaration of Douglas Clifford, dated December 28, 1988, filed herein.

It is important to note in this case that Fantasy has made no effort to demonstrate any belief that Fogerty actually copied himself when he wrote "OLD MAN." As pointed out in defendants' original Memorandum, Fantasy has always behaved in the past as if it believed that Fogerty had independently created all of his compositions, even those compositions with virtually identical elements. Defendants' Memorandum In Support, pp. 10-13. If Fantasy believed that other compositions written by Fogerty and copyrighted by it were derived from other works written by Fogerty this should have been disclosed on their copyright application, and their failure to do so, in the words of Harold Barlow at trial, was a "fraud on the public." (T.T. 4-339:11-15.) Fantasy is not a stranger to John Fogerty and should not be allowed to behave as if it were. Fantasy's confused and weak response to this point is further demonstration that it simply has no good faith answer. Plaintiff's Opposition Memorandum, pp. 14-16. Fantasy, we believe intentionally, simply misses the point. If Fantasy believed "KEEP ON CHOOGLIN' " and "BOOTLEG" were composed at the same time and contained on the same Creedence Clearwater Revival album, were independently created, even though they have virtually identical choruses, then on what good faith basis did Fantasy ever

conclude that "OLD MAN," written in 1984, was copied by John Fogerty from his 1970 composition "JUNGLE"?

There is no good faith answer to this question. Fantasy never had any belief that Fogerty copied. This expensive and time-consuming litigation was brought in this Court solely to satisfy Zaentz's desire for revenge and his efforts to punish John Fogerty.

IV.

FANTASY'S FRIVOLOUS COPYRIGHT CLAIM WAS BROUGHT IN BAD FAITH TO SATISFY ZAENTZ'S DESIRE FOR REVENGE AND TO PUNISH FOGERTY.

Fantasy makes an effort to detail why Zaentz is angry at Fogerty, but makes no effort to deny that Zaentz is, in fact, angry at Fogerty. Plaintiff's Opposition Memorandum, pp. 8-11. The reasoning behind this argument is, apparently, the same as that which motivated Mr. Rudman to read to the jury during his summation the words of "ZANZ KAN'T DANZ." Presumably, Mr. Rudman was attempting to create sympathy in the jury for Zaentz and to create animosity against Mr. Fogerty. The instant action, however, is not one for defamation. Whether or not Zaentz has any good faith belief he is entitled to sue John Fogerty for defamation is irrelevant to whether or not this lawsuit for copyright infringement was motivated by Zaentz's desire to punish Fogerty for that same defamation and for other perceived slights.

Rather than deny Zaentz's ill will and anger toward Fogerty, Fantasy tries to create the impression that Zaentz had nothing to do with the filing and prosecution of this copyright infringement claim. This position is absurd.

This infringement action and the defamation case have been carefully coordinated and timed in such a manner that no one can seriously deny Zaentz's involvement in both. Not only do Messrs. Burnstein and Rudman represent both Fantasy in this case and Zaentz in the defamation case, but this and the defamation case were filed on exactly the same day, July 26, 1985, in this Court and in the Los Angeles Superior Court.

Fantasy also seems to argue that Zaentz's ill will toward Fogerty cannot have motivated this copyright infringement case because Warner Bros. Inc. has also been sued in the instant action. Plaintiff's Opposition Memorandum, p. 11. This argument ignores the fact that Zaentz has also sued Warner Bros. Inc. for defamation in the state court action he commenced.

V.

THERE IS A NEED TO DETER FANTASY AND ZAENTZ FROM FILING ANY FUTURE, FRIVOLOUS COPYRIGHT INFRINGEMENT CLAIMS.

Fantasy's opposition papers clearly demonstrate the need to deter it from filing any more copyright infringement claims against John Fogerty. From Fantasy's viewpoint, all it needs do is hire an expert who will render an opinion that a new song by Fogerty is sufficiently similar to one of old compositions so that the presumption of copying might arise. Fantasy sees no need in buying such an opinion to request their expert to review the rest of John Fogerty's compositions. Nor does Fantasy believe it has any need in such circumstances to advise its expert that, in the past, Fantasy has always believed that Fogerty

had sufficient creative powers to independently create, and not copy, musical compositions that were similar, and on some occasions, identical in significant portion. Armed with such a purchased opinion, Fantasy claims it is free to file another infringement claim against Fogerty, regardless of anyone's actual belief that Fogerty copied.

This declaration of a willingness to abuse the copyright monopoly currently held by Fantasy in over 40 compositions written by Fogerty is appalling. Fantasy's assertion that Fogerty has written 25 compositions, and it has only sued him for infringement once, provides no assurances. "OLD MAN" was the first single from the first album released by John Fogerty in which Fantasy had no economic interest. The prior album, "JOHN FOGERTY," was sold by Fantasy outside out of the United States.

Under Fantasy's view of the copyright laws, John Fogerty remains vulnerable to further frivolous claims driven by improper motives. He deserves the deterrance that an award of costs, including reasonable attorneys' fees would provide in the instant action.

VI.

CONCLUSION

Defendants' showing that this case has been brought in bad faith and is frivolous has not been controverted by Fantasy. All Fantasy has demonstrated is that the two songs were similar enough so that this Court allowed the jury to resolve the question of infringement. Under clear Ninth Circuit authority, however, this does not preclude a finding that Fantasy's copyright claims were frivolous.

Fantasy never believed that Fogerty actually copied himself when he wrote "OLD MAN." If so, the goal was to devise a copyright infringement claim that would survive through trial and thus impose the greatest punishment upon Fogerty. The substantial financial burden placed on Fogerty in the form of the fees and costs paid by him to defend against this baseless claim is a far greater burden for Fogerty than the costs of prosecuting the lawsuit are to Zaentz and Fantasy. The pressure of this cost for Fogerty was compounded by the impounding of royalties due to him for four years. This claim was carefully crafted and coordinated with Zaentz's personal claim for defamation against Fogerty in which Zaentz claims that two other songs from the "CENTERFIELD" album and interviews given by Fogerty at the time of the release of the album defame Fogerty.

This is precisely the extraordinary situation where this Court should exercise its discretion and grant to defendants their full costs, including reasonable attorneys' fees, incurred in the defense of the instant action.

DATED: December 29, 1988.

Respectfully submitted,

RUDIN AND APPEL
MILTON A. RUDIN
JOSEPH L. GOLDEN

GIPSON, HOFFMAN & PANCIONE
KENNETH I. SIDLE
VINCENT H. CHIEFFO

By: /s/ Kenneth I. Sidle
KENNETH I. SIDLE
Attorneys For Defendants

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